

## EXHIBIT 2

**Baker & Hostetler LLP**

45 Rockefeller Plaza  
New York, NY 10111  
Telephone: (212) 589-4200  
Facsimile: (212) 589-4201  
David J. Sheehan  
Nicholas J. Cremona  
Geraldine E. Ponto  
Dean D. Hunt

*Attorneys for Irving H. Picard, Trustee for the  
Substantively Consolidated SIPA Liquidation of  
Bernard L. Madoff Investment Securities LLC and  
the Estate of Bernard L. Madoff*

**UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK**

SECURITIES INVESTOR PROTECTION  
CORPORATION,

Plaintiff-Applicant,

v.

BERNARD L. MADOFF INVESTMENT  
SECURITIES LLC,

Defendant.

Adv. Pro. No. 08-01789 (SMB)

SIPA LIQUIDATION

(Substantively Consolidated)

In re:

BERNARD L. MADOFF,

Debtor.

IRVING H. PICARD, Trustee for the Liquidation  
of Bernard L. Madoff Investment Securities LLC,

Plaintiff,

v.

DAVID IVAN LUSTIG,

Defendant.

Adv. Pro. No. 10-04554 (SMB)

### **TRUSTEE'S FIRST AMENDED COMPLAINT**

Plaintiff Irving H. Picard (the "Trustee"), as trustee for the liquidation of the business of Bernard L. Madoff Investment Securities LLC ("BLMIS") under the Securities Investor Protection Act, 15 U.S.C. §§ 78aaa, *et seq.* ("SIPA"),<sup>1</sup> and the substantively consolidated estate of Bernard L. Madoff ("Madoff," and with BLMIS, "Debtors"), by the Trustee's undersigned counsel, for his first amended complaint (the "First Amended Complaint") against David Ivan Lustig ("Defendant"), states as follows:

### **NATURE OF PROCEEDING**

1. This adversary proceeding arises from the massive Ponzi scheme perpetrated by Madoff. Over the course of the scheme, there were more than 8,000 client accounts at BLMIS. In early December 2008, BLMIS generated client account statements for its approximately 4,900 open client accounts. When added together, these statements purport to show that clients of BLMIS had approximately \$65 billion invested with BLMIS. In reality, BLMIS had assets on hand worth a small fraction of that amount. On March 12, 2009, Madoff admitted to the fraudulent scheme and pled guilty to 11 felony counts, and was sentenced on June 29, 2009 to 150 years in prison.

2. Defendant was a beneficiary of this Ponzi scheme. Since December 11, 2006, Defendant received \$2,000,000 from BLMIS. The Trustee's investigation has revealed that \$1,863,225 of this amount represented fictitious profits from the Ponzi scheme. Accordingly, Defendant has received \$1,863,225 of other people's money. This action is brought to recover

---

<sup>1</sup> Hereinafter, applicable sections of SIPA shall be cited as SIPA § \_\_\_\_, and omit reference to title 15, United States Code.

the fictitious profit amount so that this customer property can be equitably distributed among all of the victims of BLMIS.

### **JURISDICTION AND VENUE**

3. This is an adversary proceeding commenced in this Court, in which the main underlying SIPA proceeding, No. 08-01789 (SMB) (the “SIPA Proceeding”), is pending. The SIPA Proceeding was originally brought in the United States District Court for the Southern District of New York as *Securities Exchange Commission v. Bernard L. Madoff Investment Securities LLC et al.*, No. 08 CV 10791 (the “District Court Proceeding”) and has been referred to this Court. This Court has jurisdiction over this adversary proceeding under 28 U.S.C. § 1334(b) and (e)(1), and 15 U.S.C. § 78eee(b)(2)(A) and (b)(4).

4. This is a core proceeding under 28 U.S.C. §§ 157(b)(2)(A), (H) and (O). The Trustee consents to the entry of final orders or judgment by this Court if it is determined that consent of the parties is required for this Court to enter final orders or judgment consistent with Article III of the U.S. Constitution.

5. Venue in this judicial district is proper under 28 U.S.C. § 1409.

6. This adversary proceeding is brought pursuant to sections 78fff(b), 78fff-1(a) and 78fff-2(c)(3) of SIPA, sections 105(a), 548(a), 550(a) and 551 of title 11 of the United States Code (the “Bankruptcy Code”), and other applicable law, for avoidance of fraudulent conveyances in connection with a transfer of property by BLMIS to Defendant. The Trustee seeks to set aside such transfer and preserve and recover the property for the benefit of BLMIS’s defrauded customers.

## **DEFENDANT**

7. Upon information and belief, Defendant David Ivan Lustig maintains an address in Pescadero, California. Defendant holds a BLMIS account in the name, “NTC & Co. FBO David Ivan Lustig,” with the account address reported in Pescadero, California.<sup>2</sup>

## **BACKGROUND, THE TRUSTEE AND STANDING**

8. On December 11, 2008 (the “Filing Date”), Madoff was arrested by federal agents for criminal violations of federal securities laws, including securities fraud, investment adviser fraud, and mail and wire fraud. Contemporaneously, the Securities and Exchange Commission (“SEC”) commenced the District Court Proceeding.

9. On December 15, 2008, under SIPA § 78eee(a)(4)(A), the SEC consented to combining its action with an application by the Securities Investor Protection Corporation (“SIPC”). Thereafter, under SIPA § 78eee(a)(4)(B), SIPC filed an application in the District Court alleging, among other things, that BLMIS could not meet its obligations to securities customers as they came due and its customers needed the protections afforded by SIPA.

10. Also on December 15, 2008, Judge Stanton granted SIPC’s application and entered an order pursuant to SIPA, which, in pertinent part:

- (a) appointed the Trustee for the liquidation of the business of BLMIS pursuant to SIPA § 78eee(b)(3);
- (b) appointed Baker & Hostetler LLP as counsel to the Trustee pursuant to SIPA § 78eee(b)(3); and
- (c) removed the case to this Court pursuant to SIPA § 78eee(b)(4).

---

<sup>2</sup> NTC & Co. LLP was named as a defendant in this action in the original Complaint filed on December 1, 2010 but has been dismissed from this action pursuant to the Court’s So Ordered Stipulation entered on May 11, 2011.

11. By orders dated December 23, 2008 and February 4, 2009, respectively, this Court approved the Trustee's bond and found that the Trustee was a disinterested person. Accordingly, the Trustee is duly qualified to serve and act on behalf of the estate.

12. On April 13, 2009, an involuntary bankruptcy petition was filed against Madoff, and on June 9, 2009, this Court substantively consolidated the chapter 7 estate of Madoff into the SIPA Proceeding.

13. At a plea hearing on March 12, 2009, in the case captioned *United States v. Madoff*, Case No. 09-CR-213(DC), Madoff pleaded guilty to an 11-count criminal information filed against him by the United States Attorney for the Southern District of New York. At the plea hearing, Madoff admitted he "operated a Ponzi scheme through the investment advisory side of [BLMIS]."

14. At a plea hearing on August 11, 2009, in the case captioned *United States v. DiPascali*, Case No. 09-CR-764 (RJS), Frank DiPascali, a former BLMIS employee, pleaded guilty to a ten-count criminal information charging him with participating in and conspiring to perpetuate the Ponzi scheme. DiPascali admitted that no purchases or sales of securities took place in connection with BLMIS customer accounts and that the Ponzi scheme had been ongoing at BLMIS since at least the 1980s.

15. At a plea hearing on November 21, 2011, in the case captioned *United States v. Kugel*, Case No. 10-CR-228 (LTS), David Kugel, a former BLMIS trader and manager, pleaded guilty to a six-count criminal information charging him with securities fraud, falsifying the records of BLMIS, conspiracy, and bank fraud. Kugel admitted to helping create false, backdated trades in BLMIS customer accounts beginning in the early 1970s.

16. On March 24, 2014, Daniel Bonventre, Annette Bongiorno, Jo Ann Crupi, George Perez, and Jerome O'Hara were convicted of fraud and other crimes in connection with their participation in the Ponzi scheme as employees of BLMIS's investment advisory business ("IA Business").

17. As the Trustee appointed under SIPA, the Trustee is charged with assessing claims, recovering and distributing customer property to BLMIS's customers holding allowed customer claims, and liquidating any remaining BLMIS assets for the benefit of the estate and its creditors. The Trustee is using his authority under SIPA and the Bankruptcy Code to avoid and recover payouts of fictitious profits and/or other transfers made by the Debtors to customers and others to the detriment of defrauded, innocent customers whose money was consumed by the Ponzi scheme. Absent this and other recovery actions, the Trustee will be unable to satisfy the claims described in subparagraphs (A) through (D) of SIPA § 78fff-2(c)(1).

18. Pursuant to SIPA § 78fff-1(a), the Trustee has the general powers of a bankruptcy trustee in a case under the Bankruptcy Code in addition to the powers granted by SIPA pursuant to SIPA § 78fff(b). Chapters 1, 3, 5 and subchapters I and II of chapter 7 of the Bankruptcy Code apply to this proceeding to the extent consistent with SIPA pursuant to SIPA § 78fff(b).

19. The Trustee has standing to bring the avoidance and recovery claims under SIPA § 78fff-1(a) and applicable provisions of the Bankruptcy Code, including 11 U.S.C. §§ 323(b) and 704(a)(1), because the Trustee has the power and authority to avoid and recover transfers under Bankruptcy Code sections 548, 550(a), and 551, and SIPA §§ 78fff-1(a) and 78fff-2(c)(3).

### **THE PONZI SCHEME**

20. Madoff founded BLMIS in or about 1960 as a sole proprietorship. On January 1, 2001, Madoff continued BLMIS as a sole member limited liability company under the laws of the State of New York. BLMIS's ownership and control did not change since its formation in

1960. During that time, BLMIS had been continually registered with the SEC, and remained a SIPC member since its formation in late 1970. For most of its existence, BLMIS operated from its principal place of business at 885 Third Avenue, New York, New York. Madoff, as founder, sole owner, chairman, and chief executive officer, operated BLMIS with several family members and other employees, including DiPascali and David Kugel, who pleaded guilty to helping Madoff carry out the fraudulent scheme.

21. Beginning in the 1990s, Madoff outwardly ascribed the consistent investment success of BLMIS's IA Business to the "split-strike conversion" ("SSC") investment strategy. Madoff claimed his strategy would produce steady returns without the volatility in the stock market or other high return investment strategies. Madoff generally indicated that investors' funds would be invested in a basket of common stocks within the Standard & Poor's 100 Index ("S&P 100 Index"), which is a collection of the 100 largest publicly traded companies, as determined by Standard & Poor's Index Committee. The basket of stocks was designed to correlate to the movement of the S&P 100 Index. The second part of the SSC strategy involved purporting to sell call options and buy put options on the S&P 100 Index; this is commonly referred to as a "collar." Madoff purported to purchase and sell option contracts to control the downside risk of price changes in the basket of stocks correlated to the performance of the S&P 100 Index. All options relating to the companies within the S&P 100 Index, including options based upon the S&P 100 Index itself, clear through the Options Clearing Corporation ("OCC"). The OCC has no records showing that BLMIS's IA Business cleared any trades in any exchange-listed options.

22. BLMIS commingled all of the funds received from IA Business investors in a single BLMIS account maintained at JPMorgan Chase Bank.

23. Because Madoff claimed that he would carefully time purchases and sales to maximize value, customer funds would intermittently be out of the market. During those times, Madoff claimed that the funds were invested in U.S. Treasury securities (“Treasury Bills”) or mutual funds invested in Treasury Bills. There is no record of BLMIS clearing a single purchase or sale of securities in connection with the SSC strategy at the Depository Trust & Clearing Corporation, the clearing house for such transactions, or any other trading platform on which BLMIS could have traded securities. There are no other BLMIS records that demonstrate that BLMIS traded securities using the SSC strategy.

24. At their plea hearings, Madoff and DiPascali admitted that BLMIS purchased none of the securities listed on the IA Business customers’ fraudulent statements.

25. Madoff operated the IA Business as a Ponzi scheme. The money received from IA Business customers was used primarily to make distributions to, or payments for, other customers. The falsified trades reflected in monthly account statements made it appear that the IA Business accounts included substantial gains on customers’ principal investments. The Ponzi scheme collapsed in December 2008, when the requests for redemptions overwhelmed the flow of new investments with BLMIS’s IA Business.

26. Since at least 1983, BLMIS financial reports filed with the SEC fraudulently omitted the existence of the billions of dollars of customer funds held by BLMIS.

27. BLMIS did not register as an investment adviser with the SEC until August 2006. At that time, BLMIS filed with the SEC a Form ADV (Uniform Application for Investment Adviser Registration) representing, among other things, that BLMIS had 23 customer accounts and assets under management of \$11.7 billion. Thereafter, BLMIS filed a Form ADV annually with the SEC, the latest of which was filed in January 2008. It represented that BLMIS had 23

customer accounts with assets under management of \$17.1 billion. In fact, at that time BLMIS had over 4,900 active customer accounts with a purported value of approximately \$68 billion under management.

28. Contrary to standard practice in the investment advisory industry, BLMIS did not charge the IA Business customers a fee for investment advisory services. Madoff knew others that solicited investors for BLMIS, or, directly or indirectly, funded customer accounts, charged hundreds of millions of dollars for investment advisory services attributed to BLMIS. Instead of investment advisory fees, BLMIS purported to accept commissions for the purported trades, as reflected in the fraudulent IA Business customer statements.

29. BLMIS's auditor was Friehling & Horowitz, CPA, P.C. ("Friehling & Horowitz"), a three-person accounting firm in Rockland County, New York. Of the three employees at the firm, one employee was an administrative assistant and one was a semi-retired accountant living in Florida. On or about November 3, 2009, David Friehling, the sole proprietor of Friehling & Horowitz, pleaded guilty to filing false audit reports for BLMIS and filing false tax returns for Madoff and others.

30. At all relevant times, BLMIS was insolvent because (i) its assets were worth less than the value of its liabilities; (ii) it could not meet its obligations as they came due; and (iii) at the time of the transfer alleged herein, BLMIS was left with insufficient capital.

### **THE TRANSFER**

31. According to BLMIS's records, an account (No. 1ZR297) was maintained with BLMIS, as set forth on Exhibit A (the "Account"). Upon information and belief, for the Account, a Customer Agreement, an Option Agreement, and/or a Trading Authorization Limited to Purchases and Sales of Securities and Options (collectively, the "Account Agreements") were

executed and delivered to BLMIS at BLMIS's headquarters at 885 Third Avenue, New York, New York. At all times relevant hereto, NTC & Co. LLP was custodian of the Account.

32. The Account Agreements were to be performed in New York, New York through securities trading activities that would take place in New York, New York. The Account was held in New York, New York, and Defendant sent funds to BLMIS and/or to BLMIS's account at JPMorgan Chase & Co., Account #xxxxxxxxxx1703 (the "BLMIS Bank Account") in New York, New York for application to the Account and the purported conducting of trading activities. Between the date the Account was opened and the Filing Date, Defendant made deposits to BLMIS through checks and/or wire transfers into the BLMIS Bank Account and/or received inter-account transfers from other BLMIS accounts.

33. During the two years prior to the Filing Date, BLMIS made a transfer (the "Transfer") to Defendant, totaling \$1,863,225 in fictitious profits from the Ponzi scheme.

34. The Transfer received by Defendant constitutes non-existent profits supposedly earned in the Account, but, in reality, they were other people's money. The Transfer was made to Defendant and is set forth in Column 10 on Exhibit B annexed hereto.

35. The Transfer is avoidable and recoverable under sections 548(a), 550(a)(1) and 551 of the Bankruptcy Code and applicable provisions of SIPA, particularly SIPA section 78fff-2(c)(3).

### **CUSTOMER CLAIMS**

36. On or about June 30, 2009, a customer claim was filed with the Trustee which the Trustee has designated as Claim # 013425 (the "Customer Claim").

37. On or about October 19, 2009, the Trustee issued a Notice of Trustee's Determination of Claim (the "Determination") with respect to the Customer Claim. A copy of the Determination is attached hereto as Exhibit C.

38. On or about December 17, 2009, an objection to the Determination was filed with the Court (the “Claims Objection”).

39. On December 23, 2008, this Court entered an Order on Application for Entry of an Order Approving Form and Manner of Publication and Mailing of Notices, Specifying Procedures for Filing, Determination and Adjudication of Claims, and Providing Other Relief (“Claims Procedures Order”; ECF No. 12). The Claims Procedures Order includes a process for determination and allowance of claims under which the Trustee has been operating.

40. The Trustee’s discovery and investigation is ongoing and the Trustee reserves the right to: (i) supplement the information on the Transfer and any additional transfers; and (ii) seek avoidance and recovery of such additional transfers.

41. To the extent that any of the recovery counts may be inconsistent with each other, they are to be treated as being pleaded in the alternative.

**COUNT ONE**  
**FRAUDULENT TRANSFER – 11 U.S.C. §§ 548(a)(1)(A), 550(a) AND 551**

42. To the extent applicable, the Trustee incorporates by reference the allegations contained in the previous paragraphs of this First Amended Complaint as if fully rewritten herein.

43. The Transfer was made on or within two years before the Filing Date.

44. The Transfer constituted a transfer of an interest of BLMIS in property within the meaning of section 101(54) of the Bankruptcy Code and pursuant to section 78fff-2(c)(3) of SIPA.

45. The Transfer was made by BLMIS with the actual intent to hinder, delay or defraud some or all of BLMIS’s then existing and/or future creditors.

46. The Transfer was made to Defendant.

48. As a result of the foregoing, pursuant to sections 105(a), 548(a)(1)(A), 550(a), and 551 of the Bankruptcy Code and 15 U.S.C. § 78fff-2(c)(3), the Trustee is entitled to a judgment: (a) avoiding and preserving the Transfer; (b) directing that the Transfer be set aside; (c) recovering the Transfer, or the value thereof, from the Defendant for the benefit of the BLMIS estate; and (d) awarding any other relief the Court deems just and appropriate.

i. On the First Claim for Relief, pursuant to sections 105(a), 548(a)(1)(A), 550(a), and 551 of the Bankruptcy Code and 15 U.S.C. § 78fff-2(c)(3), judgment: (a) avoiding and preserving the Transfer; (b) directing that the Transfer be set aside; (c) recovering the Transfer, or the value thereof, from the Defendant for the benefit of the BLMIS estate; (d) awarding any other relief the Court deems just and appropriate;

iii. On the First Claim for Relief, establishing a constructive trust over the Transfer and its proceeds, product and offspring in favor of the Trustee for the benefit of the estate;

iv. On the First Claim for Relief, pursuant to federal common law and/or N.Y. CPLR 5001 and 5004, as applicable, awarding the Trustee prejudgment interest from the date on which the Transfer was received;

v. On the First Claim for Relief, awarding the Trustee all applicable interest, costs and disbursements incurred in this proceeding; and

vi. Granting the Trustee such other, further, and different relief as the Court deems just, proper, and equitable.

Date: March 18, 2016  
New York, New York

Of Counsel:

By: /s/ Nicholas J. Cremona

**BAKER & HOSTETLER LLP**  
1000 Louisiana, Suite 2000  
Houston, Texas 77002-5018  
Telephone: (713)751-1600  
Facsimile: (713)751-1717  
Dean D. Hunt  
Email: dhunt@bakerlaw.com  
Farrell A. Hochmuth  
Email: fhochmuth@bakerlaw.com

**BAKER & HOSTETLER LLP**  
45 Rockefeller Plaza  
New York, New York 10111  
Telephone: (212) 589-4200  
Facsimile: (212) 589-4201  
David J. Sheehan  
Email: dsheehan@bakerlaw.com  
Nicholas J. Cremona  
Email: ncremona@bakerlaw.com  
Geraldine E. Ponto  
Email: gponto@bakerlaw.com

*Attorneys for Irving H. Picard, Trustee for the  
Substantively Consolidated SIPA Liquidation  
of Bernard L. Madoff Investment Securities  
LLC and Bernard L. Madoff*

BLMIS Account Name		BLMIS Account Number
NTC & CO. FBO DAVID IVAN LUSTIG - REDACTED		1ZR297

## BLMIS ACCOUNT NO. 1ZR297 - NTC &amp; CO. FBO DAVID IVAN LUSTIG REDACTED

Column 1 Date	Column 2 Transaction Description	Column 3 Transaction Amount Reported in Customer Statement	Column 4 Cash Deposits	Column 5 Cash Withdrawals	Column 6 Transfers of Principal In	Column 7 Transfers of Principal Out	Column 8 Balance of Principal	Column 9 90-Day Preferential Transfers	Column 10 2-Year Fraudulent Transfers	Column 11 6-Year Fraudulent Conveyances
5/30/2000	CHECK	56,265	56,265	-	-	-	56,265	-	-	-
5/31/2000	TRANS FROM 1ZA31430	1,225,426 <sup>[1]</sup>	-	-	-	-	56,265	-	-	-
8/16/2000	TRANS FROM 1ZA31430	536 <sup>[1]</sup>	-	-	-	-	56,265	-	-	-
12/18/2001	CHECK	28,638	28,638	-	-	-	84,903	-	-	-
5/12/2003	CHECK	51,872	51,872	-	-	-	136,775	-	-	-
7/25/2007	CHECK WIRE	(2,000,000)	-	(2,000,000)	-	-	(1,863,225)	-	(1,863,225)	(1,863,225)
	<b>Total:</b>		<b>\$ 136,775</b>	<b>\$ (2,000,000)</b>	<b>\$ -</b>	<b>\$ -</b>	<b>\$ (1,863,225)</b>	<b>\$ -</b>	<b>\$ (1,863,225)</b>	<b>\$ (1,863,225)</b>

<sup>[1]</sup> Although BLMIS statements reflect that funds were transferred into this account on this date, these funds consisted entirely of fictitious profits which were never achieved and thus no funds were actually transferred into the account on this date. Accordingly, the account balance has remained unchanged.

**BERNARD L. MADOFF INVESTMENT SECURITIES LLC**

In Liquidation

**DECEMBER 11, 2008<sup>1</sup>**

**NOTICE OF TRUSTEE'S DETERMINATION OF CLAIM**

October 19, 2009

NTC & Co. FBO David Ivan Lustig (IRA)

**REDACTED**

Pescadero CA 94060

Dear NTC & Co. FBO David Ivan Lustig (IRA):

**PLEASE READ THIS NOTICE CAREFULLY.**

The liquidation of the business of BERNARD L. MADOFF INVESTMENT SECURITIES LLC ("BLMIS") is being conducted by Irving H. Picard, Trustee under the Securities Investor Protection Act, 15 U.S.C. § 78aaa et seq. ("SIPA"), pursuant to an order entered on December 15, 2008 by the United States District Court for the Southern District of New York.

The Trustee has made the following determination regarding your claim on BLMIS Account No. 1ZR297 designated as Claim Number 013425:

Your claim for a credit balance of \$3,985.00 and for securities is **DENIED**. No securities were ever purchased for your account.

Further, based on the Trustee's analysis, the amount of money you withdrew from your account at BLMIS (total of \$2,000,000.00), as more fully set forth in Table 1 annexed hereto and made a part hereof, is greater than the amount that was deposited with BLMIS for the purchase of securities (total

---

<sup>1</sup> Section 78III(7)(B) of SIPA states that the filing date is "the date on which an application for a protective decree is filed under 78eee(a)(3)," except where the debtor is the subject of a proceeding pending before a United States court "in which a receiver, trustee, or liquidator for such debtor has been appointed and such proceeding was commenced before the date on which such application was filed, the term 'filing date' means the date on which such proceeding was commenced." Section 78III(7)(B). Thus, even though the Application for a protective decree was filed on December 15, 2008, the Filing Date in this action is on December 11, 2008.

of \$136,774.75). As noted, no securities were ever purchased by BLMIS for your account. Any and all profits reported to you by BLMIS on account statements were fictitious.

As reflected in Table 1, certain of the transfers into or out of your account have been adjusted. As part of the Trustee's analysis of accounts, the Trustee has assessed accounts based on a money in/money out analysis (i.e., has the investor deposited more or less than he or she withdrew from BLMIS). This analysis allows the Trustee to determine which part of an account's balance is originally invested principal and which part is fictitious gains that were fabricated by BLMIS. A customer's allowed claim is based on the amount of principal in the customer's account.

Whenever a customer requested a transfer from one account to another, the Trustee analyzed whether the transferor account had principal in the account at the time of the transfer. The available principal in the account was transferred to and credited in the transferee account. Thus, the reason that the adjusted amount of transferred deposits or withdrawals in Table 1 is less than the purported transfer amount is that the transferor account did not have sufficient principal available to effectuate the full transfer. The difference between the purported transfer amount and the adjusted transfer amount is the amount of fictitious gain that was transferred to or from your account. Under the money in/money out analysis, the Trustee does not give credit for fictitious gains in settling your allowed claim.

Since there were no profits to use either to purchase securities or to pay you any money beyond the amount that was deposited into your BLMIS account, the amount of money you received in excess of the deposits in your account (\$1,863,225.25) was taken from other customers and given to you. Accordingly, because you have withdrawn more than was deposited into your account, you do not have a positive "net equity" in your account and you are not entitled to an allowed claim in the BLMIS liquidation proceeding. Therefore, your claim is **DENIED** in its entirety.

Should a final and unappealable court order determine that the Trustee is incorrect in his interpretation of "net equity" and its corresponding application to the determination of customer claims, the Trustee will be bound by that order and will apply it retroactively to all previously determined customer claims in accordance with the Court's order. Nothing in this Notice of Trustee's Determination of Claim shall be construed as a waiver of any rights or claims held by you in having your customer claim re-determined in accordance with any such Court order.

Nothing in this Notice of Trustee's Determination of Claim shall be construed as a waiver of any rights or claims held by the Trustee against you.

**PLEASE TAKE NOTICE:** If you disagree with this determination and desire a hearing before Bankruptcy Judge Burton R. Lifland, you **MUST** file your written opposition, setting forth the grounds for your disagreement, referencing Bankruptcy Case No. 08-1789 (BRL) and attaching copies of any documents in support of your position, with the United States Bankruptcy Court and the Trustee within **THIRTY DAYS** after October 19, 2009, the date on which the Trustee mailed this notice.



Total deposits less withdrawals:	(\$637,262.97)	(\$1,863,225.25)
----------------------------------	----------------	------------------

## EXHIBIT 3

**Baker & Hostetler LLP**

45 Rockefeller Plaza  
New York, NY 10111  
Telephone: (212) 589-4200  
Facsimile: (212) 589-4201  
David J. Sheehan  
Nicholas J. Cremona  
Geraldine E. Ponto  
Dean D. Hunt

*Attorneys for Irving H. Picard, Trustee for the  
Substantively Consolidated SIPA Liquidation of  
Bernard L. Madoff Investment Securities LLC and  
the Estate of Bernard L. Madoff*

**UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK**

SECURITIES INVESTOR PROTECTION  
CORPORATION,

Plaintiff-Applicant,

v.

BERNARD L. MADOFF INVESTMENT  
SECURITIES LLC,

Defendant.

Adv. Pro. No. 08-01789 (SMB)

SIPA LIQUIDATION

(Substantively Consolidated)

In re:

BERNARD L. MADOFF,

Debtor.

IRVING H. PICARD, Trustee for the Liquidation  
of Bernard L. Madoff Investment Securities LLC,

Plaintiff,

v.

THE LUSTIG FAMILY 1990 TRUST; and  
DAVID I. LUSTIG, individually and in his  
capacity as Trustee for The Lustig Family 1990  
Trust,

Adv. Pro. No. 10-04417 (SMB)

Defendants.

### **TRUSTEE'S FIRST AMENDED COMPLAINT**

Plaintiff Irving H. Picard (the "Trustee"), as trustee for the liquidation of the business of Bernard L. Madoff Investment Securities LLC ("BLMIS") under the Securities Investor Protection Act, 15 U.S.C. §§ 78aaa, *et seq.* ("SIPA"),<sup>1</sup> and the substantively consolidated estate of Bernard L. Madoff ("Madoff," and with BLMIS, "Debtors"), by the Trustee's undersigned counsel, for his first amended complaint (the "First Amended Complaint") against The Lustig Family 1990 Trust (the "Lustig Trust") and David I. Lustig, individually and in his capacity as Trustee for The Lustig Family 1990 Trust ("Lustig") (collectively, "Defendants"), states as follows:

### **NATURE OF PROCEEDING**

1. This adversary proceeding arises from the massive Ponzi scheme perpetrated by Madoff. Over the course of the scheme, there were more than 8,000 client accounts at BLMIS. In early December 2008, BLMIS generated client account statements for its approximately 4,900 open client accounts. When added together, these statements purport to show that clients of BLMIS had approximately \$65 billion invested with BLMIS. In reality, BLMIS had assets on hand worth a small fraction of that amount. On March 12, 2009, Madoff admitted to the fraudulent scheme and pled guilty to 11 felony counts, and was sentenced on June 29, 2009 to 150 years in prison.

2. Defendants were beneficiaries of this Ponzi scheme. Since December 11, 2006, Defendants received \$8,800,000 from BLMIS. The Trustee's investigation has revealed that \$4,241,336 of this amount represented fictitious profits from the Ponzi scheme. Accordingly,

Defendants have received \$4,241,336 of other people's money. This action is brought to recover the fictitious profit amount so that this customer property can be equitably distributed among all of the victims of BLMIS.

### **JURISDICTION AND VENUE**

3. This is an adversary proceeding commenced in this Court, in which the main underlying SIPA proceeding, No. 08-01789 (SMB) (the "SIPA Proceeding"), is pending. The SIPA Proceeding was originally brought in the United States District Court for the Southern District of New York as *Securities Exchange Commission v. Bernard L. Madoff Investment Securities LLC et al.*, No. 08 CV 10791 (the "District Court Proceeding") and has been referred to this Court. This Court has jurisdiction over this adversary proceeding under 28 U.S.C. § 1334(b) and (e)(1), and 15 U.S.C. § 78eee(b)(2)(A) and (b)(4).

4. This is a core proceeding under 28 U.S.C. §§ 157(b)(2)(A), (H) and (O). The Trustee consents to the entry of final orders or judgment by this Court if it is determined that consent of the parties is required for this Court to enter final orders or judgment consistent with Article III of the U.S. Constitution.

5. Venue in this judicial district is proper under 28 U.S.C. § 1409.

6. This adversary proceeding is brought pursuant to sections 78fff(b), 78fff-1(a) and 78fff-2(c)(3) of SIPA, sections 105(a), 548(a), 550(a) and 551 of title 11 of the United States Code (the "Bankruptcy Code"), and other applicable law, for avoidance of fraudulent conveyances in connection with certain transfers of property by BLMIS to or for the benefit of Defendants. The Trustee seeks to set aside such transfers and preserve and recover the property for the benefit of BLMIS's defrauded customers.

---

<sup>1</sup> Hereinafter, applicable sections of SIPA shall be cited as SIPA § \_\_\_\_, and omit reference to title 15, United States Code.

### **DEFENDANTS**

7. Upon information and belief, Defendant the Lustig Trust is a Trust that was formed under the laws of the state of California. The Lustig Trust holds a BLMIS account in the name, “David I Lustig TRF Lustig Family 1990 Trust,” with the account address reported in Pescadero, California.

8. Upon information and belief, Defendant Lustig maintains his residence in Pescadero, California.

### **BACKGROUND, THE TRUSTEE AND STANDING**

9. On December 11, 2008 (the “Filing Date”), Madoff was arrested by federal agents for criminal violations of federal securities laws, including securities fraud, investment adviser fraud, and mail and wire fraud. Contemporaneously, the Securities and Exchange Commission (“SEC”) commenced the District Court Proceeding.

10. On December 15, 2008, under SIPA § 78eee(a)(4)(A), the SEC consented to combining its action with an application by the Securities Investor Protection Corporation (“SIPC”). Thereafter, under SIPA § 78eee(a)(4)(B), SIPC filed an application in the District Court alleging, among other things, that BLMIS could not meet its obligations to securities customers as they came due and its customers needed the protections afforded by SIPA.

11. Also on December 15, 2008, Judge Stanton granted SIPC’s application and entered an order pursuant to SIPA, which, in pertinent part:

- (a) appointed the Trustee for the liquidation of the business of BLMIS pursuant to SIPA § 78eee(b)(3);
- (b) appointed Baker & Hostetler LLP as counsel to the Trustee pursuant to SIPA § 78eee(b)(3); and
- (c) removed the case to this Court pursuant to SIPA § 78eee(b)(4).

12. By orders dated December 23, 2008 and February 4, 2009, respectively, this Court approved the Trustee's bond and found that the Trustee was a disinterested person. Accordingly, the Trustee is duly qualified to serve and act on behalf of the estate.

13. On April 13, 2009, an involuntary bankruptcy petition was filed against Madoff, and on June 9, 2009, this Court substantively consolidated the chapter 7 estate of Madoff into the SIPA Proceeding.

14. At a plea hearing on March 12, 2009, in the case captioned *United States v. Madoff*, Case No. 09-CR-213(DC), Madoff pleaded guilty to an 11-count criminal information filed against him by the United States Attorney for the Southern District of New York. At the plea hearing, Madoff admitted he "operated a Ponzi scheme through the investment advisory side of [BLMIS]."

15. At a plea hearing on August 11, 2009, in the case captioned *United States v. DiPascali*, Case No. 09-CR-764 (RJS), Frank DiPascali, a former BLMIS employee, pleaded guilty to a ten-count criminal information charging him with participating in and conspiring to perpetuate the Ponzi scheme. DiPascali admitted that no purchases or sales of securities took place in connection with BLMIS customer accounts and that the Ponzi scheme had been ongoing at BLMIS since at least the 1980s.

16. At a plea hearing on November 21, 2011, in the case captioned *United States v. Kugel*, Case No. 10-CR-228 (LTS), David Kugel, a former BLMIS trader and manager, pleaded guilty to a six-count criminal information charging him with securities fraud, falsifying the records of BLMIS, conspiracy, and bank fraud. Kugel admitted to helping create false, backdated trades in BLMIS customer accounts beginning in the early 1970s.

17. On March 24, 2014, Daniel Bonventre, Annette Bongiorno, Jo Ann Crupi, George Perez, and Jerome O'Hara were convicted of fraud and other crimes in connection with their participation in the Ponzi scheme as employees of BLMIS's investment advisory business ("IA Business").

18. As the Trustee appointed under SIPA, the Trustee is charged with assessing claims, recovering and distributing customer property to BLMIS's customers holding allowed customer claims, and liquidating any remaining BLMIS assets for the benefit of the estate and its creditors. The Trustee is using his authority under SIPA and the Bankruptcy Code to avoid and recover payouts of fictitious profits and/or other transfers made by the Debtors to customers and others to the detriment of defrauded, innocent customers whose money was consumed by the Ponzi scheme. Absent this and other recovery actions, the Trustee will be unable to satisfy the claims described in subparagraphs (A) through (D) of SIPA § 78fff-2(c)(1).

19. Pursuant to SIPA § 78fff-1(a), the Trustee has the general powers of a bankruptcy trustee in a case under the Bankruptcy Code in addition to the powers granted by SIPA pursuant to SIPA § 78fff(b). Chapters 1, 3, 5 and subchapters I and II of chapter 7 of the Bankruptcy Code apply to this proceeding to the extent consistent with SIPA pursuant to SIPA § 78fff(b).

20. The Trustee has standing to bring the avoidance and recovery claims under SIPA § 78fff-1(a) and applicable provisions of the Bankruptcy Code, including 11 U.S.C. §§ 323(b) and 704(a)(1), because the Trustee has the power and authority to avoid and recover transfers under Bankruptcy Code sections 548, 550(a), and 551, and SIPA §§ 78fff-1(a) and 78fff-2(c)(3).

### **THE PONZI SCHEME**

21. Madoff founded BLMIS in or about 1960 as a sole proprietorship. On January 1, 2001, Madoff continued BLMIS as a sole member limited liability company under the laws of the State of New York. BLMIS's ownership and control did not change since its formation in

1960. During that time, BLMIS had been continually registered with the SEC, and remained a SIPC member since its formation in late 1970. For most of its existence, BLMIS operated from its principal place of business at 885 Third Avenue, New York, New York. Madoff, as founder, sole owner, chairman, and chief executive officer, operated BLMIS with several family members and other employees, including DiPascali and David Kugel, who pleaded guilty to helping Madoff carry out the fraudulent scheme.

22. Beginning in the 1990s, Madoff outwardly ascribed the consistent investment success of BLMIS's IA Business to the "split-strike conversion" ("SSC") investment strategy. Madoff claimed his strategy would produce steady returns without the volatility in the stock market or other high return investment strategies. Madoff generally indicated that investors' funds would be invested in a basket of common stocks within the Standard & Poor's 100 Index ("S&P 100 Index"), which is a collection of the 100 largest publicly traded companies, as determined by Standard & Poor's Index Committee. The basket of stocks was designed to correlate to the movement of the S&P 100 Index. The second part of the SSC strategy involved purporting to sell call options and buy put options on the S&P 100 Index; this is commonly referred to as a "collar." Madoff purported to purchase and sell option contracts to control the downside risk of price changes in the basket of stocks correlated to the performance of the S&P 100 Index. All options relating to the companies within the S&P 100 Index, including options based upon the S&P 100 Index itself, clear through the Options Clearing Corporation ("OCC"). The OCC has no records showing that BLMIS's IA Business cleared any trades in any exchange-listed options.

23. BLMIS commingled all of the funds received from IA Business investors in a single BLMIS account maintained at JPMorgan Chase Bank.

25. At their plea hearings, Madoff and DiPascali admitted that BLMIS purchased none of the securities listed on the IA Business customers' fraudulent statements.

27. Since at least 1983, BLMIS financial reports filed with the SEC fraudulently omitted the existence of the billions of dollars of customer funds held by BLMIS.

-8-

29. Contrary to standard practice in the investment advisory industry, BLMIS did not charge the IA Business customers a fee for investment advisory services. Madoff knew others that solicited investors for BLMIS, or, directly or indirectly, funded customer accounts, charged hundreds of millions of dollars for investment advisory services attributed to BLMIS. Instead of investment advisory fees, BLMIS purported to accept commissions for the purported trades, as reflected in the fraudulent IA Business customer statements.

31. At all relevant times, BLMIS was insolvent because (i) its assets were worth less than the value of its liabilities; (ii) it could not meet its obligations as they came due; and (iii) at the time of the transfers alleged herein, BLMIS was left with insufficient capital.

## THE TRANSFERS

executed and delivered to BLMIS at BLMIS's headquarters at 885 Third Avenue, New York, New York.

33. The Account Agreements were to be performed in New York, New York through securities trading activities that would take place in New York, New York. The Account was held in New York, New York, and Defendants sent funds to BLMIS and/or to BLMIS's account at JPMorgan Chase & Co., Account #xxxxxxxxxx1703 (the "BLMIS Bank Account") in New York, New York for application to the Account and the purported conducting of trading activities. Between the date the Account was opened and the Filing Date, Defendants made deposits to BLMIS through checks and/or wire transfers into the BLMIS Bank Account and/or received inter-account transfers from other BLMIS accounts.

34. During the two years prior to the Filing Date, BLMIS made transfers (collectively, the "Transfers") to Lustig, or in the alternative to the Lustig Trust and for the benefit of Lustig, totaling \$4,241,336 in fictitious profits from the Ponzi scheme.

35. The Transfers received by Defendants constitute non-existent profits supposedly earned in the Account, but, in reality, they were other people's money. The Transfers, as discussed in detail below, were made to or for the benefit of Defendants and are set forth in Column 10 on Exhibit B annexed hereto.

36. Specifically, Defendant Lustig requested that BLMIS wire each of the Transfers to a bank account held in his name (the "David Lustig Bank Account"). Upon information and belief, the David Lustig Bank Account was held by Defendant Lustig, either individually, or as trustee of the Lustig Trust and for Lustig's benefit. Following each request, each Transfer was wired from BLMIS to the David Lustig Bank Account.

38. On or about December 18, 2007, Lustig sent a letter to BLMIS by facsimile.

39. On or about September 23, 2008, Lustig sent a letter to BLMIS by facsimile.

40. The Transfers are avoidable and recoverable under sections 548(a), 550(a)(1) and

## CUSTOMER CLAIMS

42. On or about August 28, 2009, the Trustee issued a Notice of Trustee's Determination of Claim (the "Determination") with respect to the Customer Claim. A copy of the Determination is attached hereto as Exhibit C.

43. On or about September 23, 2009, an objection to the Determination was filed with the Court (the "Claims Objection").

44. On December 23, 2008, this Court entered an Order on Application for Entry of an Order Approving Form and Manner of Publication and Mailing of Notices, Specifying Procedures for Filing, Determination and Adjudication of Claims, and Providing Other Relief ("Claims Procedures Order"; ECF No. 12). The Claims Procedures Order includes a process for determination and allowance of claims under which the Trustee has been operating.

45. The Trustee's discovery and investigation is ongoing and the Trustee reserves the right to: (i) supplement the information on the Transfers and any additional transfers; and (ii) seek avoidance and recovery of such additional transfers.

46. To the extent that any of the recovery counts may be inconsistent with each other, they are to be treated as being pleaded in the alternative.

**COUNT ONE**  
**FRAUDULENT TRANSFER – 11 U.S.C. §§ 548(a)(1)(A), 550(a) AND 551**

47. To the extent applicable, the Trustee incorporates by reference the allegations contained in the previous paragraphs of this First Amended Complaint as if fully rewritten herein.

48. Each of the Transfers was made on or within two years before the Filing Date.

49. Each of the Transfers constituted a transfer of an interest of BLMIS in property within the meaning of section 101(54) of the Bankruptcy Code and pursuant to section 78fff-2(c)(3) of SIPA.

or defraud some or all of BLMIS's then existing and/or future creditors.

and for the benefit of Lustig.

pursuant to section 550(a) of the Bankruptcy Code and section 78fff-2(c)(3) of SIPA.

estate; and (d) awarding any other relief the Court deems just and appropriate.

of the Trustee and against Defendants as follows:

awarding any other relief the Court deems just and appropriate;

used, in whole or in part, to purchase, improve and/or maintain such property;

iii. On the First Claim for Relief, establishing a constructive trust over all Transfers and their proceeds, product and offspring in favor of the Trustee for the benefit of the estate;

iv. On the First Claim for Relief, pursuant to federal common law and/or N.Y. CPLR 5001 and 5004, as applicable, awarding the Trustee prejudgment interest from the date on which the Transfers were received;

v. On the First Claim for Relief, awarding the Trustee all applicable interest, costs and disbursements incurred in this proceeding; and

vi. Granting the Trustee such other, further, and different relief as the Court deems just, proper, and equitable.

Date: March 18, 2016  
New York, New York

Of Counsel:

By: /s/ Nicholas J. Cremona

**BAKER & HOSTETLER LLP**  
1000 Louisiana, Suite 2000  
Houston, Texas 77002-5018  
Telephone: (713)751-1600  
Facsimile: (713)751-1717  
Dean D. Hunt  
Email: dhunt@bakerlaw.com  
Farrell A. Hochmuth  
Email: fhochmuth@bakerlaw.com

**BAKER & HOSTETLER LLP**  
45 Rockefeller Plaza  
New York, New York 10111  
Telephone: (212) 589-4200  
Facsimile: (212) 589-4201  
David J. Sheehan  
Email: dsheehan@bakerlaw.com  
Nicholas J. Cremona  
Email: ncremona@bakerlaw.com  
Geraldine E. Ponto  
Email: gponto@bakerlaw.com

*Attorneys for Irving H. Picard, Trustee for the  
Substantively Consolidated SIPA Liquidation  
of Bernard L. Madoff Investment Securities  
LLC and Bernard L. Madoff*

BLMIS Account Name	BLMIS Account Number
DAVID I LUSTIG TRF LUSTIG FAMILY 1990 TRUST DATED 1/31/90	1ZB268

## BLMIS ACCOUNT NO. 1ZB268 - DAVID I LUSTIG TRF LUSTIG FAMILY 1990 TRUST DATED 1/31/90

08-01-2019-emb Doc 162-17-4 Filed 06/16/17 Entered 06/16/17 22:03:40  
 10-04-2019-emb Doc 162-17-4 Filed 06/16/17 Entered 06/16/17 22:03:40  
 Pg 37 of 120 Pg 37 of 120

Column 1	Column 2	Column 3	Column 4	Column 5	Column 6	Column 7	Column 8	Column 9	Column 10	Column 11
Date	Transaction Description	Transaction Amount Reported in Customer Statement	Cash Deposits	Cash Withdrawals	Transfers of Principal In	Transfers of Principal Out	Balance of Principal	90-Day Preferential Transfers	2-Year Fraudulent Transfers	6-Year Fraudulent Conveyances
10/11/1995	CHECK	500,000	500,000	-	-	-	500,000	-	-	-
3/18/1996	CHECK	400,000	400,000	-	-	-	900,000	-	-	-
9/24/1996	CHECK WIRE	1,000,000	1,000,000	-	-	-	1,900,000	-	-	-
11/1/1996	CHECK WIRE	1,000,000	1,000,000	-	-	-	2,900,000	-	-	-
7/18/1997	CHECK WIRE	(1,000,000)	-	(1,000,000)	-	-	1,900,000	-	-	-
1/2/1998	CHECK WIRE	1,000,000	1,000,000	-	-	-	2,900,000	-	-	-
6/22/1998	CHECK WIRE	(1,000,000)	-	(1,000,000)	-	-	1,900,000	-	-	-
12/24/1998	CHECK WIRE	(1,000,000)	-	(1,000,000)	-	-	900,000	-	-	-
8/19/1999	CHECK WIRE	(1,100,000)	-	(1,100,000)	-	-	(200,000)	-	-	-
11/4/1999	CHECK WIRE	1,000,000	1,000,000	-	-	-	800,000	-	-	-
11/5/1999	CHECK WIRE	100,000	100,000	-	-	-	900,000	-	-	-
11/10/1999	TRANS TO IZA31430 A/O 11/5/99	(100,000) <sup>[1]</sup>	-	-	-	(81,818)	818,182	-	-	-
11/10/1999	TRANS TO IZA31430 A/O 11/4/99	(1,000,000) <sup>[1]</sup>	-	-	-	(818,182)	-	-	-	-
2/24/2000	CHECK WIRE	(1,100,000)	-	(1,100,000)	-	-	(1,100,000)	-	-	-
7/17/2001	CHECK WIRE	6,541,617	6,541,617	-	-	-	5,441,617	-	-	-
12/4/2001	CHECK WIRE	(700,000)	-	(700,000)	-	-	4,741,617	-	-	-
1/9/2002	CHECK WIRE	485,000	485,000	-	-	-	5,226,617	-	-	-
4/4/2003	CHECK WIRE	(750,000)	-	(750,000)	-	-	4,476,617	-	-	-
2/19/2004	CHECK WIRE	500,000	500,000	-	-	-	4,976,617	-	-	-
3/17/2004	CHECK WIRE	500,000	500,000	-	-	-	5,476,617	-	-	-
3/24/2004	CHECK WIRE	500,000	500,000	-	-	-	5,976,617	-	-	-
4/7/2004	CHECK WIRE	500,000	500,000	-	-	-	6,476,617	-	-	-
5/5/2004	CHECK WIRE	500,000	500,000	-	-	-	6,976,617	-	-	-
5/17/2004	CHECK WIRE	300,000	300,000	-	-	-	7,276,617	-	-	-
6/3/2004	CHECK WIRE	500,000	500,000	-	-	-	7,776,617	-	-	-
6/25/2004	CHECK WIRE	200,438	200,438	-	-	-	7,977,055	-	-	-
7/23/2004	CHECK WIRE	500,000	500,000	-	-	-	8,477,055	-	-	-
7/28/2004	CHECK WIRE	(500,000)	-	(500,000)	-	-	7,977,055	-	-	-
12/10/2004	CHECK WIRE	(2,000,000)	-	(2,000,000)	-	-	5,977,055	-	-	-
1/11/2005	CHECK WIRE	2,000,000	2,000,000	-	-	-	7,977,055	-	-	-
3/2/2005	CHECK WIRE	675,000	675,000	-	-	-	8,652,055	-	-	-
3/30/2005	CHECK WIRE	31,609	31,609	-	-	-	8,683,664	-	-	-
4/11/2005	CHECK WIRE	(1,000,000)	-	(1,000,000)	-	-	7,683,664	-	-	-
6/28/2005	CHECK WIRE	(3,000,000)	-	(3,000,000)	-	-	4,683,664	-	-	-
1/17/2006	CHECK WIRE	2,000,000	2,000,000	-	-	-	6,683,664	-	-	-
3/30/2006	CHECK WIRE	(2,000,000)	-	(2,000,000)	-	-	4,683,664	-	-	-
5/25/2006	CHECK WIRE	1,875,000	1,875,000	-	-	-	6,558,664	-	-	-
6/6/2006	CHECK WIRE	(2,000,000)	-	(2,000,000)	-	-	4,558,664	-	-	-
6/26/2007	CHECK WIRE	(1,800,000)	-	(1,800,000)	-	-	2,758,664	-	-	-
7/24/2007	CHECK WIRE	(5,000,000)	-	(5,000,000)	-	-	(2,241,336)	-	(2,241,336)	(2,241,336)
1/2/2008	CHECK WIRE	(500,000)	-	(500,000)	-	-	(2,741,336)	-	(500,000)	(500,000)
9/25/2008	CHECK WIRE	(1,500,000)	-	(1,500,000)	-	-	(4,241,336)	-	(1,500,000)	(1,500,000)
Total:			\$ 22,608,664	\$ (25,950,000)	\$ -	\$ (900,000)	\$ (4,241,336)	\$ -	\$ (4,241,336)	\$ (4,241,336)

<sup>[1]</sup> Although BLMIS statements reflect that a larger transfer was made out of the account on this date, a portion of the "transferred" funds consisted of fictitious profits which were never achieved and thus could not have been transferred. Accordingly, only the principal remaining in the account was transferred out of the account on this date.

**BERNARD L. MADOFF INVESTMENT SECURITIES LLC**

In Liquidation

**DECEMBER 11, 2008<sup>1</sup>**

**NOTICE OF TRUSTEE'S DETERMINATION OF CLAIM**

August 28, 2009

David I Lustig  
TRF Lustig Family 1990 Trust Dated 1/31/90  
**REDACTED**  
Pescadero, California 94060

Dear Mr. Lustig:

**PLEASE READ THIS NOTICE CAREFULLY.**

The liquidation of the business of BERNARD L. MADOFF INVESTMENT SECURITIES LLC ("BLMIS") is being conducted by Irving H. Picard, Trustee under the Securities Investor Protection Act, 15 U.S.C. § 78aaa et seq. ("SIPA"), pursuant to an order entered on December 15, 2008 by the United States District Court for the Southern District of New York.

The Trustee has made the following determination regarding your claim on BLMIS Account No. 1ZB268 designated as Claim Number 13424:

Your claim for a credit balance of \$13,207.00 and for securities is **DENIED**. No securities were ever purchased for your account.

Further, based on the Trustee's analysis, the amount of money you withdrew from your account at BLMIS (total of \$26,850,000.00), as more fully set forth in Table 1, is greater than the amount that was deposited with BLMIS for the purchase of securities (total of \$22,608,664.05). As noted, no

---

<sup>1</sup> Section 78III(7)(B) of SIPA states that the filing date is "the date on which an application for a protective decree is filed under 78eee(a)(3)," except where the debtor is the subject of a proceeding pending before a United States court "in which a receiver, trustee, or liquidator for such debtor has been appointed and such proceeding was commenced before the date on which such application was filed, the term 'filing date' means the date on which such proceeding was commenced." Section 78III(7)(B). Thus, even though the Application for a protective decree was filed on December 15, 2008, the Filing Date in this action is on December 11, 2008.

securities were ever purchased by BLMIS for your account. Any and all profits reported to you by BLMIS on account statements were fictitious.

Since there were no profits to use either to purchase securities or to pay you any money beyond the amount that was deposited into your BLMIS account, the amount of money you received in excess of the deposits in your account (\$4,241,335.95) was taken from other customers and given to you. Accordingly, because you have withdrawn more than was deposited into your account, you do not have a positive "net equity" in your account and you are not entitled to an allowed claim in the BLMIS liquidation proceeding. Therefore, your claim is **DENIED** in its entirety.

- Table 1 -			
DEPOSITS			
DATE	TRANSACTION DESCRIPTION	AMOUNT	ADJUSTED AMOUNT
10/11/1995	CHECK	\$500,000.00	\$500,000.00
3/18/1996	CHECK	\$400,000.00	\$400,000.00
9/24/1996	CHECK WIRE	\$1,000,000.00	\$1,000,000.00
11/1/1996	CHECK WIRE	\$1,000,000.00	\$1,000,000.00
1/2/1998	CHECK WIRE	\$1,000,000.00	\$1,000,000.00
11/4/1999	CHECK WIRE	\$1,000,000.00	\$1,000,000.00
11/5/1999	CHECK WIRE	\$100,000.00	\$100,000.00
7/17/2001	CHECK WIRE	\$6,541,616.88	\$6,541,616.88
1/9/2002	CHECK WIRE	\$485,000.00	\$485,000.00
2/19/2004	CHECK WIRE	\$500,000.00	\$500,000.00
3/17/2004	CHECK WIRE	\$500,000.00	\$500,000.00
3/24/2004	CHECK WIRE	\$500,000.00	\$500,000.00
4/7/2004	CHECK WIRE	\$500,000.00	\$500,000.00
5/5/2004	CHECK WIRE	\$500,000.00	\$500,000.00
5/17/2004	CHECK WIRE	\$300,000.00	\$300,000.00
6/3/2004	CHECK WIRE	\$500,000.00	\$500,000.00
6/25/2004	CHECK WIRE	\$200,438.36	\$200,438.36
7/23/2004	CHECK WIRE	\$500,000.00	\$500,000.00
1/11/2005	CHECK WIRE	\$2,000,000.00	\$2,000,000.00
3/2/2005	CHECK WIRE	\$675,000.00	\$675,000.00
3/30/2005	CHECK WIRE	\$31,608.81	\$31,608.81
1/17/2006	CHECK WIRE	\$2,000,000.00	\$2,000,000.00
5/25/2006	CHECK WIRE	\$1,875,000.00	\$1,875,000.00
<b>Total Deposits:</b>		\$22,608,664.05	\$22,608,664.05

WITHDRAWALS			
DATE	TRANSACTION DESCRIPTION	AMOUNT	ADJUSTED AMOUNT
7/18/1997	CHECK WIRE	(\$1,000,000.00)	(\$1,000,000.00)
6/22/1998	CHECK WIRE	(\$1,000,000.00)	(\$1,000,000.00)
12/24/1998	CHECK WIRE	(\$1,000,000.00)	(\$1,000,000.00)
8/19/1999	CHECK WIRE	(\$1,100,000.00)	(\$1,100,000.00)
11/10/1999	TRANS TO 1ZA31430 A/O 11/5/99	(\$100,000.00)	(\$81,818.18)
11/10/1999	TRANS TO 1ZA31430 A/O 11/4/99	(\$1,000,000.00)	(\$818,181.82)
2/24/2000	CHECK WIRE	(\$1,100,000.00)	(\$1,100,000.00)
12/4/2001	CHECK WIRE	(\$700,000.00)	(\$700,000.00)
4/4/2003	CHECK WIRE	(\$750,000.00)	(\$750,000.00)
7/28/2004	CHECK WIRE	(\$500,000.00)	(\$500,000.00)
12/10/2004	CHECK WIRE	(\$2,000,000.00)	(\$2,000,000.00)
4/11/2005	CHECK WIRE	(\$1,000,000.00)	(\$1,000,000.00)
6/28/2005	CHECK WIRE	(\$3,000,000.00)	(\$3,000,000.00)
3/30/2006	CHECK WIRE	(\$2,000,000.00)	(\$2,000,000.00)
6/6/2006	CHECK WIRE	(\$2,000,000.00)	(\$2,000,000.00)
6/26/2007	CHECK WIRE	(\$1,800,000.00)	(\$1,800,000.00)
7/24/2007	CHECK WIRE	(\$5,000,000.00)	(\$5,000,000.00)
1/2/2008	CHECK WIRE	(\$500,000.00)	(\$500,000.00)
9/25/2008	CHECK WIRE	(\$1,500,000.00)	(\$1,500,000.00)
<b>Total Withdrawals:</b>		(\$27,050,000.00)	(\$26,850,000.00)
<b>Total deposits less withdrawals:</b>		(\$4,441,335.95)	(\$4,241,335.95)

As reflected in Table 1, certain of the transfers into or out of your account have been adjusted. As part of the Trustee's analysis of accounts, the Trustee has assessed accounts based on a money in/money out analysis (i.e., has the investor deposited more or less than he or she withdrew from BLMIS). This analysis allows the Trustee to determine which part of an account's balance is originally invested principal and which part is fictitious gains that were fabricated by BLMIS. A customer's allowed claim is based on the amount of principal in the customer's account.

When ever a customer requested a transfer from one account to another, the Trustee analyzed whether the transferor account had principal in the account at the time of the transfer. The available principal in the account was transferred to and credited in the transferee account. Thus, the reason that the adjusted amount of transferred deposits in Table 1 is less than the purported transfer amount is that the transferor account did not have sufficient principal available to effectuate the full transfer. The difference between the purported transfer amount and the adjusted transfer amount is the amount of fictitious gain that was transferred to or from your account. Under the money in/money out analysis, the Trustee does not give credit for fictitious gains in settling your allowed claim.

Should a final and unappealable court order determine that the Trustee is incorrect in his interpretation of "net equity" and its corresponding application to the determination of customer claims, the Trustee will be bound by that order and will apply it retroactively to all previously determined customer claims in accordance with the Court's order. Nothing in this Notice of Trustee's Determination of Claim shall be construed as a waiver of any rights or claims held by you in having your customer claim re-determined in accordance with any such Court order.

Nothing in this Notice of Trustee's Determination of Claim shall be construed as a waiver of any rights or claims held by the Trustee against you.

**PLEASE TAKE NOTICE:** If you disagree with this determination and desire a hearing before Bankruptcy Judge Burton R. Lifland, you **MUST** file your written opposition, setting forth the grounds for your disagreement, referencing Bankruptcy Case No. 08-1789 (BRL) and attaching copies of any documents in support of your position, with the United States Bankruptcy Court **and** the Trustee within **THIRTY DAYS** after August 28, 2009, the date on which the Trustee mailed this notice.

**PLEASE TAKE FURTHER NOTICE:** If you do not properly and timely file a written opposition, the Trustee's determination with respect to your claim will be deemed confirmed by the Court and binding on you.

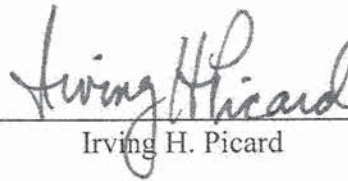
**PLEASE TAKE FURTHER NOTICE:** If you properly and timely file a written opposition, a hearing date for this controversy will be obtained by the Trustee and you will be notified of that hearing date. Your failure to appear personally or through counsel at such hearing will result in the Trustee's determination with respect to your claim being confirmed by the Court and binding on you.

**PLEASE TAKE FURTHER NOTICE:** You must mail your opposition, if any, in accordance with the above procedure, to each of the following addresses:

Clerk of the United States Bankruptcy Court for  
the Southern District of New York  
One Bowling Green  
New York, New York 10004

and

Irving H. Picard, Trustee  
c/o Baker & Hostetler LLP  
45 Rockefeller Plaza  
New York, New York 10011

  
Irving H. Picard

Trustee for the Liquidation of the Business of  
Bernard L. Madoff Investment Securities LLC

cc: Austin G. Bosarge  
Turning Point Law  
**REDACTED**  
San Rafael, California 94903

## EXHIBIT 4

LAW OFFICE OF  
RICHARD E. SIGNORELLI  
799 Broadway, Suite 539  
New York, NY 10003  
Telephone: 212 254 4218  
Facsimile: 212 254 1396  
rsignorelli@nycLITIGATOR.com<sup>SM</sup>  
www.nycLITIGATOR.com<sup>SM</sup>  
*Attorneys for Defendant David Ivan Lustig*

UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X  
SECURITIES INVESTOR PROTECTION  
CORPORATION,

Adv. Pro. No. 08-01789 (SMB)

Plaintiff-Applicant,

SIPA LIQUIDATION

v.

(Substantively Consolidated)

BERNARD L. MADOFF INVESTMENT  
SECURITIES LLC,

Defendant.

-----X  
In re:

BERNARD L. MADOFF,

Debtor.

-----X  
IRVING PICARD, Trustee for the Liquidation  
of Bernard L. Madoff Investment Securities LLC,

Plaintiff,

Adv. Pro. No. 10-4554 (SMB)

v.

DAVID IVAN LUSTIG,

Defendant.

-----X  
**ANSWER AND AFFIRMATIVE DEFENSES**

Defendant David Ivan Lustig, by his attorneys, as and for his answer to the Trustee's First Amended Complaint ("FAC"), respectfully alleges as follows, by like-numbered paragraph:

**As to "Nature Of Proceeding"**

1. Deny having knowledge or information sufficient to form a belief as to the truth of each and every allegation.
2. Deny each and every allegation, except admit that the Trustee purports to bring this action to recover alleged fictitious profits as stated therein. Insofar as the allegations purport to state questions or conclusions of law, no response is required, and such matters of law are respectfully referred to the Court.

**As to "Jurisdiction And Venue"**

3. Deny having knowledge or information sufficient to form a belief as to the truth of each and every allegation, except admit that this is an adversary proceeding commenced in this Court; that the underlying proceeding under the Securities Investor Protection Act ("SIPA") is pending in this Court; and that the Trustee purports to invoke this Court's jurisdiction as stated therein.
4. Deny having knowledge or information sufficient to form a belief as to the truth of each and every allegation, except admit that the Trustee purports to consent to the entry of final orders or judgment by this Court as stated therein. Insofar as the allegations purport to state questions or conclusions of law, no response is required, and such matters of law are respectfully referred to the Court.
5. Deny each and every allegation, except admit that the Trustee purports to base

venue as stated therein.

6. Deny each and every allegation, except admit that the Trustee purports to bring this adversary proceeding and to seek relief as stated therein.

**As to “Defendant”**

7. Deny each and every allegation, except admit that Mr. Lustig maintains an address in Pescadero, California.

**As to “Background, The Trustee And Standing”**

8. Deny having knowledge or information sufficient to form a belief as to the truth of each and every allegation, except admit that Bernard L. Madoff (“Madoff”) was arrested and charged with criminal violations.

9. Deny having knowledge or information sufficient to form a belief as to the truth of each and every allegation.

10. Deny having knowledge or information sufficient to form a belief as to the truth of each and every allegation.

11. Deny having knowledge or information sufficient to form a belief as to the truth of each and every allegation.

12. Deny having knowledge or information sufficient to form a belief as to the truth of each and every allegation.

13. Deny having knowledge or information sufficient to form a belief as to the truth of each and every allegation, except admit that Madoff pleaded guilty to criminal violations.

14. Deny having knowledge or information sufficient to form a belief as to the truth of each and every allegation, except admit that Frank DiPascali pleaded guilty to criminal

violations.

15. Deny having knowledge or information sufficient to form a belief as to the truth of each and every allegation, except admit that David Kugel pleaded guilty to criminal violations.

16. Deny having knowledge or information sufficient to form a belief as to the truth of each and every allegation, except admit that Daniel Bonventre, Annette Bongiorno, Jo Ann Crupi, George Perez, and Jerome O'Hara were convicted of criminal violations.

17. Deny having knowledge or information sufficient to form a belief as to the truth of each and every allegation, except deny the allegations that, absent this adversary proceeding against Mr. Lustig, an innocent investor, "the Trustee will be unable to satisfy the claims described in subparagraphs (A) through (D) of SIPA § 78fff-2(c)(1)." Insofar as the allegations purport to state questions or conclusions of law, no response is required, and such matters of law are respectfully referred to the Court.

18. Deny having knowledge or information sufficient to form a belief as to the truth of each and every allegation. Insofar as the allegations purport to state questions or conclusions of law, no response is required, and such matters of law are respectfully referred to the Court.

19. Deny having knowledge or information sufficient to form a belief as to the truth of each and every allegation, except deny that the Trustee has standing to bring this adversary proceeding against Mr. Lustig. Insofar as the allegations purport to state questions or conclusions of law, no response is required, and such matters of law are respectfully referred to the Court.

**As to “The Ponzi Scheme”**

20. Deny having knowledge or information sufficient to form a belief as to the truth of each and every allegation, except admit that Bernard L. Madoff Investment Securities, LLC (“BLMIS”) was registered with the United States Securities and Exchange Commission (“SEC”) and was a member of the Securities Investor Protection Corporation (“SIPC”). Insofar as the allegations purport to state questions or conclusions of law, no response is required, and such matters of law are respectfully referred to the Court.

21. Deny having knowledge or information sufficient to form a belief as to the truth of each and every allegation.

22. Deny having knowledge or information sufficient to form a belief as to the truth of each and every allegation.

23. Deny having knowledge or information sufficient to form a belief as to the truth of each and every allegation.

24. Deny having knowledge or information sufficient to form a belief as to the truth of each and every allegation.

25. Deny having knowledge or information sufficient to form a belief as to the truth of each and every allegation.

26. Deny having knowledge or information sufficient to form a belief as to the truth of each and every allegation.

27. Deny having knowledge or information sufficient to form a belief as to the truth of each and every allegation.

28. Deny having knowledge or information sufficient to form a belief as to the

truth of each and every allegation.

29. Deny having knowledge or information sufficient to form a belief as to the truth of each and every allegation.

30. Deny having knowledge or information sufficient to form a belief as to the truth of each and every allegation. Insofar as the allegations purport to state questions or conclusions of law, no response is required, and such matters of law are respectfully referred to the Court.

**As to “The Transfer”**

31. Deny having knowledge or information sufficient to form a belief as to the truth of each and every allegation, except admit that an account identified as Account No. 1ZR297 (“Account”) was maintained with BLMIS and that, upon information and belief, certain documents related to the Account were executed and delivered to BLMIS.

32. Deny having knowledge or information sufficient to form a belief as to the truth of each and every allegation, except admit that deposits and transfers were made into the Account.

33. Deny each and every allegation, and state that the entire sum of \$2,000,000 that was withdrawn from the Account on or about July 25, 2007, was immediately reinvested back into BLMIS through third-party feeder fund Lakeview Investment, LP (“Lakeview”) and thereafter remained invested with BLMIS until all of it was lost as a result of Madoff’s fraud. Mr. Lustig, therefore, did not actually receive any fictitious profits and, in fact, lost money as a result of Madoff’s fraud.

34. Deny each and every allegation, and state that the entire sum of \$2,000,000

that was withdrawn from the Account on or about July 25, 2007, was immediately reinvested back into BLMIS through third-party feeder fund Lakeview and thereafter remained invested with BLMIS until all of it was lost as a result of Madoff's fraud. Mr. Lustig, therefore, did not actually receive any fictitious profits and, in fact, lost money as a result of Madoff's fraud.

35. Deny each and every allegation. Insofar as the allegations purport to state questions or conclusions of law, no response is required, and such matters of law are respectfully referred to the Court.

**As to "Customer Claims"**

36. Admit that a customer claim designated as Claim Number 013425 ("Customer Claim") was filed with the Trustee.

37. Admit that a Notice of Trustee's Determination of Claim ("Determination") was issued with respect to the Customer Claim on or about October 19, 2009.

38. Admit that an objection to the Determination was filed.

39. Deny having knowledge or information sufficient to form a belief as to the truth of each and every allegation, and respectfully refer the Court to the order in question for its full contents and meanings.

40. Deny having knowledge or information sufficient to form a belief as to the truth of each and every allegation. Insofar as the allegations purport to state questions or conclusions of law, no response is required, and such matters of law are respectfully referred to the Court.

41. Deny each and every allegation. Insofar as the allegations purport to state questions or conclusions of law, no response is required, and such matters of law are respectfully

referred to the Court.

**As to "Count One"**

42. Repeat and reallege each and every allegation, admission, and denial made in response to the paragraphs of the FAC which are referred to in this paragraph.

43. Deny each and every allegation, except admit that a withdrawal of \$2,000,000 was made from the Account on or about July 25, 2007, and state that this entire sum was immediately reinvested back into BLMIS through third-party feeder fund Lakeview and thereafter remained invested with BLMIS until all of it was lost as a result of Madoff's fraud. Mr. Lustig, therefore, did not actually receive any fictitious profits and, in fact, lost money as a result of Madoff's fraud.

44. Deny each and every allegation. Insofar as the allegations purport to state questions or conclusions of law, no response is required, and such matters of law are respectfully referred to the Court.

45. Deny having knowledge or information sufficient to form a belief as to the truth of each and every allegation. Insofar as the allegations purport to state questions or conclusions of law, no response is required, and such matters of law are respectfully referred to the Court.

46. Deny each and every allegation, and state that the entire sum of \$2,000,000 that was withdrawn from the Account on or about July 25, 2007, was immediately reinvested back into BLMIS through third-party feeder fund Lakeview and thereafter remained invested with BLMIS until all of it was lost as a result of Madoff's fraud. Mr. Lustig, therefore, did not actually receive any fictitious profits and, in fact, lost money as a result of Madoff's fraud.

47. Deny each and every allegation. Insofar as the allegations purport to state questions or conclusions of law, no response is required, and such matters of law are respectfully referred to the Court.

48. Deny each and every allegation. Insofar as the allegations purport to state questions or conclusions of law, no response is required, and such matters of law are respectfully referred to the Court.

### **AFFIRMATIVE DEFENSES**

A. Mr. Lustig asserts the following affirmative defenses and reserves the right to amend this answer to assert other and further defenses when and if, in the course of investigation, discovery, or preparation for trial, it becomes appropriate to do so.

B. By identifying his allegations as “defenses”, Mr. Lustig does not excuse or relieve the Trustee of his burden of proving all elements of his claim under the applicable standard of proof. Mr. Lustig does not undertake or assume any burden that properly rests with the Trustee and does not suggest that the Trustee does not bear the burden of proof with respect to such matters or that such matters are not elements that the Trustee must establish in order to make out a prima facie case on his claim against Mr. Lustig.

C. In the event that subsequent legal developments further limit or otherwise alter the claims available to the Trustee, Mr. Lustig hereby raises each and every defense at law, in equity, or otherwise, available under any and all federal and state statutes, laws, rules, and regulations. Mr. Lustig further adopts and incorporates by reference any and all other defenses asserted or to be asserted by any other defendant or party-in-interest in pending adversary proceedings in the BLMIS SIPA liquidation proceeding to the extent that Mr. Lustig is similarly

situated and may properly assert such defense.

D. Mr. Lustig reserves and asserts all affirmative defenses available under applicable federal or state law, including, without limitation, the Federal Rules of Bankruptcy Procedure, the Federal Rules of Civil Procedure, and the New York Uniform Commercial Code, and reserves the right to assert other defenses and claims when and if it becomes appropriate to do so in this action.

E. The affirmative defenses set forth below are asserted cumulatively and in the alternative.

#### **First Affirmative Defense**

The FAC fails to state a cause of action upon which relief may be granted.

#### **Second Affirmative Defense**

Pursuant to Stern v. Marshall, 131 S.Ct. 2594 (2011) and other Supreme Court precedent, this Court “may not finally decide avoidance actions except conceivably in the process of resolving identical claims under § 502(d)[.]” See In re Madoff Sec., 490 B.R. at 55. The Trustee has not asserted a claim under 11 U.S.C. § 502(d) in this adversary proceeding. Mr. Lustig does not consent to the adjudication and entry of a final order and judgment in this adversary proceeding by this Court. Accordingly, this Court does not have the power or jurisdiction to “finally decide” this adversary proceeding.

#### **Third Affirmative Defense**

Mr. Lustig demands a trial by jury and does not consent to such a trial in this Court.

**Fourth Affirmative Defense**

The Trustee lacks standing to bring a claim against Mr. Lustig.

**Fifth Affirmative Defense**

The Trustee has no authority or jurisdiction to bring a claim against Mr. Lustig because the conditions of SIPA § 78fff-2(c)(3) have not been met. The Trustee has not established that there are insufficient funds in the BLMIS estate to pay all the claims specified in SIPA § 78fff-2(c)(1)(A) – (D).

**Sixth Affirmative Defense**

The transfer at issue is not avoidable because the funds were held in trust by BLMIS and were not property in which BLMIS had a legal interest.

**Seventh Affirmative Defense**

BLMIS incurred debts and obligations to the customer under contract law and other applicable non-bankruptcy laws and rules. The transfer at issue was made on account of and constituted satisfaction of such antecedent debts or obligations.

**Eighth Affirmative Defense**

The entire sum of \$2,000,000 that was withdrawn from the Account on or about July 25, 2007, was immediately reinvested back into BLMIS through third-party feeder fund Lakeview and thereafter remained invested with BLMIS until all of it was lost as a result of Madoff's fraud. Mr. Lustig, therefore, did not actually receive any fictitious profits and, in fact, lost money as a result of Madoff's fraud. The Trustee's attempt to recover any portion of this money from Mr. Lustig even though all of it had been returned to BLMIS and subsequently lost as a result of Madoff's fraud is unreasonable and unconscionable. Under these circumstances,

the Court should exercise its equitable powers under 11 U.S.C. § 105(a) and dismiss the Trustee's claim.

**Ninth Affirmative Defense**

The entire sum of \$2,000,000 that was withdrawn from the Account on or about July 25, 2007, was immediately reinvested back into BLMIS through third-party feeder fund Lakeview and thereafter remained invested with BLMIS until all of it was lost as a result of Madoff's fraud. Mr. Lustig, therefore, did not actually receive any fictitious profits and, in fact, lost money as a result of Madoff's fraud. Under these circumstances, the Court should exercise its equitable powers under 11 U.S.C. § 105(a) and grant Mr. Lustig an "equitable credit" in the full amount (i.e., \$2,000,000) that he had returned to BLMIS through his Lakeview investment.

**Tenth Affirmative Defense**

The entire sum of \$2,000,000 that was withdrawn from the Account on or about July 25, 2007, was immediately reinvested back into BLMIS through third-party feeder fund Lakeview and thereafter remained invested with BLMIS until all of it was lost as a result of Madoff's fraud. Mr. Lustig, therefore, did not actually receive any fictitious profits and, in fact, lost money as a result of Madoff's fraud. The Trustee's attempt to recover from Mr. Lustig money which he had thus already returned to the BLMIS estate violates the single satisfaction rule codified at 11 U.S.C. § 550(d), which bars recovery from a transferee where the value of the transferred property had already been returned to the estate.

**Eleventh Affirmative Defense**

The entire sum of \$2,000,000 that was withdrawn from the Account on or about July 25, 2007, was immediately reinvested back into BLMIS through third-party feeder fund

Lakeview and thereafter remained invested with BLMIS until all of it was lost as a result of Madoff's fraud. Mr. Lustig, therefore, did not actually receive any fictitious profits and, in fact, lost money as a result of Madoff's fraud. Accordingly, Mr. Lustig is entitled to an offset or credit under the theory of recoupment in the full amount (i.e., \$2,000,000) that he had returned to BLMIS through his Lakeview investment.

#### **Twelfth Affirmative Defense**

The entire sum of \$2,000,000 that was withdrawn from the Account on or about July 25, 2007, was immediately reinvested back into BLMIS through third-party feeder fund Lakeview and thereafter remained invested with BLMIS until all of it was lost as a result of Madoff's fraud. Mr. Lustig, therefore, did not actually receive any fictitious profits and, in fact, lost money as a result of Madoff's fraud. Accordingly, Mr. Lustig is entitled to a set-off under 11 U.S.C. § 553 in the full amount (i.e., \$2,000,000) that he had returned to BLMIS through his Lakeview investment

#### **Thirteenth Affirmative Defense**

The Trustee failed to adequately plead that the transfer at issue was made "with actual intent to hinder, delay, or defraud" as required under 11 U.S.C. § 548(a)(1)(A).

#### **Fourteenth Affirmative Defense**

The Trustee's claim is barred, in whole or in part, by the doctrines of waiver, laches, and/or estoppel.

#### **Fifteenth Affirmative Defense**

The transfer at issue, to the extent it was actually received by Mr. Lustig, was taken for value, in good faith, and without knowledge of its voidability. Accordingly, it is not

avoidable or recoverable under 11 U.S.C. §§ 548(c) and/or 550.

**Sixteenth Affirmative Defense**

The transfer at issue, to the extent it was actually received by Mr. Lustig, was taken without actual fraudulent intent and for value. Accordingly, it is not avoidable or recoverable under 11 U.S.C. §§ 548 and/or 550.

**Seventeenth Affirmative Defense**

The Trustee's claim is subject to setoff or other equitable adjustment because Mr. Lustig, to the extent he actually received the transfer at issue, received it in good faith, without knowledge of the alleged fraud, and in payment of an antecedent debt and/or on account of obligations owed by BLMIS for, inter alia: (a) amounts contractually due to a customer of BLMIS under New York law for the balances shown on prior customer account statements and related documents; (b) rescission remedies, including damages and interest, for fraud and misrepresentation pursuant to federal and state law; (c) the time value of money; (d) unjust enrichment; (e) damages for breach of fiduciary duty; and/or (f) money had and received.

**Eighteenth Affirmative Defense**

The Trustee's claim is barred to the extent the Trustee attempts to directly or indirectly avoid transfers or inter-account transfers that occurred more than two years before December 11, 2008.

**Nineteenth Affirmative Defense**

The Trustee's claim is barred to the extent the Trustee failed to properly credit inter-account transfers made to the Account. To the extent the inter-account transfers occurred outside any applicable statutory reach-back period for avoidance and/or recovery of transfers,

they may not be ignored and/or treated as if they had no value as the Trustee has no power to avoid such inter-account transfers.

**Twentieth Affirmative Defense**

By not accounting for the time value of money by making an interest adjustment or other adjustment, the Trustee incorrectly calculated the “value” represented by the principal investments in the Account and the amount of fictitious profits, if any, that may be avoided under § 548(a)(1)(A).

**Twenty-First Affirmative Defense**

By not adjusting for inflation, the Trustee incorrectly calculated the “value” represented by the principal investments in the Account and the amount of fictitious profits, if any, that may be avoided under § 548(a)(1)(A).

**Twenty-Second Affirmative Defense**

The Trustee is not entitled to recover any prejudgment interest on any recovery that he may obtain in this adversary proceeding. But if it is found that the Trustee is entitled to prejudgment interest, he is only entitled to such interest at the federal rate of interest on judgments, and only from a date that is no earlier than the date when this adversary proceeding was commenced.

**Twenty-Third Affirmative Defense**

The Trustee’s claim is barred because the Trustee failed to sufficiently trace the funds at issue from BLMIS to Mr. Lustig.

**Twenty-Fourth Affirmative Defense**

The Account is an individual retirement account and, as such, is exempt from the

Trustee's claim under applicable state law.

**Twenty-Fifth Affirmative Defense**

The Trustee's claim should be dismissed due to Mr. Lustig's justifiable reliance on the activities of governmental and regulatory bodies, such as the SEC and SIPC, to oversee and monitor the activities and business of BLMIS.

**Twenty-Sixth Affirmative Defense**

The Trustee's claim is barred by intervening or superseding events, factors, occurrences, or conditions over which Mr. Lustig had no control.

**Twenty-Seventh Affirmative Defense**

BLMIS was not formed until January 2001. The orders of the District Court and the Bankruptcy Court relating to the consolidation of the estates of BLMIS and Madoff as an individual or sole proprietor of his securities business do not confer standing or authority upon the Trustee to avoid or recover, directly or indirectly, fraudulent transfers made by Madoff prior to the formation of BLMIS.

**DEMAND FOR JUDGMENT**

WHEREFORE, defendant David Ivan Lustig respectfully demands judgment against the Trustee: (1) dismissing the First Amended Complaint and denying all relief requested therein with costs and disbursements in favor of Mr. Lustig; (2) reimbursing Mr. Lustig for the attorneys' fees and expenses that he has incurred; and (3) granting such other, further, and different relief as this Court may deem just and proper.

Dated: New York, New York  
May 2, 2016

Respectfully submitted,  
LAW OFFICE OF  
RICHARD E. SIGNORELLI

By: /s/ Richard E. Signorelli

---

Richard E. Signorelli  
Bryan Ha  
799 Broadway, Suite 539  
New York, NY 10003  
Telephone: 212 254 4218  
Facsimile: 212 254 1396  
rsignorelli@nycLITIGATOR.com<sup>SM</sup>  
www.nycLITIGATOR.com<sup>SM</sup>  
Attorneys for Defendant David Ivan Lustig

FILING AND SERVICE VIA ELECTRONIC FILING

## EXHIBIT 5

LAW OFFICE OF  
RICHARD E. SIGNORELLI  
799 Broadway, Suite 539  
New York, NY 10003  
Telephone: 212 254 4218  
Facsimile: 212 254 1396  
rsignorelli@nycLITIGATOR.com<sup>SM</sup>  
www.nycLITIGATOR.com<sup>SM</sup>  
*Attorneys for Defendants The Lustig Family  
1990 Trust and David I. Lustig, individually  
and in his capacity as Trustee for The Lustig  
Family 1990 Trust*

UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X  
SECURITIES INVESTOR PROTECTION  
CORPORATION,

Plaintiff-Applicant,

v.

BERNARD L. MADOFF INVESTMENT  
SECURITIES LLC,

Defendant.

-----X  
In re:

BERNARD L. MADOFF,

Debtor.

-----X  
IRVING PICARD, Trustee for the Liquidation  
of Bernard L. Madoff Investment Securities LLC,

Plaintiff,

v.

THE LUSTIG FAMILY 1990 TRUST, et al.,

Defendants.  
-----X

Adv. Pro. No. 08-01789 (SMB)

SIPA LIQUIDATION

(Substantively Consolidated)

Adv. Pro. No. 10-4417 (SMB)

**ANSWER AND  
AFFIRMATIVE DEFENSES**

Defendants The Lustig Family 1990 Trust (“Lustig Trust”) and David I. Lustig, individually and in his capacity as Trustee for the Lustig Trust, by their attorneys, as and for their answer to the Trustee’s First Amended Complaint (“FAC”), respectfully allege as follows, by like-numbered paragraph:

**As to “Nature Of Proceeding”**

1. Deny having knowledge or information sufficient to form a belief as to the truth of each and every allegation.
2. Deny each and every allegation, except admit that the Trustee purports to bring this action to recover alleged fictitious profits as stated therein. Insofar as the allegations purport to state questions or conclusions of law, no response is required, and such matters of law are respectfully referred to the Court.

**As to “Jurisdiction And Venue”**

3. Deny having knowledge or information sufficient to form a belief as to the truth of each and every allegation, except admit that this is an adversary proceeding commenced in this Court; that the underlying proceeding under the Securities Investor Protection Act (“SIPA”) is pending in this Court; and that the Trustee purports to invoke this Court’s jurisdiction as stated therein.
4. Deny having knowledge or information sufficient to form a belief as to the truth of each and every allegation, except admit that the Trustee purports to consent to the entry of final orders or judgment by this Court as stated therein. Insofar as the allegations purport to state questions or conclusions of law, no response is required, and such matters of law are respectfully referred to the Court.

5. Deny each and every allegation, except admit that the Trustee purports to base venue as stated therein.

6. Deny each and every allegation, except admit that the Trustee purports to bring this adversary proceeding and to seek relief as stated therein.

**As to “Defendants”**

7. Deny each and every allegation, except admit that the Lustig Trust is a trust formed under California law.

8. Admit that Mr. Lustig maintains his residence in Pescadero, California.

**As to “Background, The Trustee And Standing”**

9. Deny having knowledge or information sufficient to form a belief as to the truth of each and every allegation, except admit that Bernard L. Madoff (“Madoff”) was arrested and charged with criminal violations.

10. Deny having knowledge or information sufficient to form a belief as to the truth of each and every allegation.

11. Deny having knowledge or information sufficient to form a belief as to the truth of each and every allegation.

12. Deny having knowledge or information sufficient to form a belief as to the truth of each and every allegation.

13. Deny having knowledge or information sufficient to form a belief as to the truth of each and every allegation.

14. Deny having knowledge or information sufficient to form a belief as to the truth of each and every allegation, except admit that Madoff pleaded guilty to criminal violations.

15. Deny having knowledge or information sufficient to form a belief as to the truth of each and every allegation, except admit that Frank DiPascali pleaded guilty to criminal violations.

16. Deny having knowledge or information sufficient to form a belief as to the truth of each and every allegation, except admit that David Kugel pleaded guilty to criminal violations.

17. Deny having knowledge or information sufficient to form a belief as to the truth of each and every allegation, except admit that Daniel Bonventre, Annette Bongiorno, Jo Ann Crupi, George Perez, and Jerome O'Hara were convicted of criminal violations.

18. Deny having knowledge or information sufficient to form a belief as to the truth of each and every allegation, except deny the allegations that, absent this adversary proceeding against the defendants, who are innocent investors, "the Trustee will be unable to satisfy the claims described in subparagraphs (A) through (D) of SIPA § 78fff-2(c)(1)." Insofar as the allegations purport to state questions or conclusions of law, no response is required, and such matters of law are respectfully referred to the Court.

19. Deny having knowledge or information sufficient to form a belief as to the truth of each and every allegation. Insofar as the allegations purport to state questions or conclusions of law, no response is required, and such matters of law are respectfully referred to the Court.

20. Deny having knowledge or information sufficient to form a belief as to the truth of each and every allegation, except deny that the Trustee has standing to bring this adversary proceeding against the defendants. Insofar as the allegations purport to state questions

or conclusions of law, no response is required, and such matters of law are respectfully referred to the Court.

**As to “The Ponzi Scheme”**

21. Deny having knowledge or information sufficient to form a belief as to the truth of each and every allegation, except admit that Bernard L. Madoff Investment Securities, LLC (“BLMIS”) was registered with the United States Securities and Exchange Commission (“SEC”) and was a member of the Securities Investor Protection Corporation (“SIPC”). Insofar as the allegations purport to state questions or conclusions of law, no response is required, and such matters of law are respectfully referred to the Court.

22. Deny having knowledge or information sufficient to form a belief as to the truth of each and every allegation.

23. Deny having knowledge or information sufficient to form a belief as to the truth of each and every allegation.

24. Deny having knowledge or information sufficient to form a belief as to the truth of each and every allegation.

25. Deny having knowledge or information sufficient to form a belief as to the truth of each and every allegation.

26. Deny having knowledge or information sufficient to form a belief as to the truth of each and every allegation.

27. Deny having knowledge or information sufficient to form a belief as to the truth of each and every allegation.

28. Deny having knowledge or information sufficient to form a belief as to the

truth of each and every allegation.

29. Deny having knowledge or information sufficient to form a belief as to the truth of each and every allegation.

30. Deny having knowledge or information sufficient to form a belief as to the truth of each and every allegation.

31. Deny having knowledge or information sufficient to form a belief as to the truth of each and every allegation. Insofar as the allegations purport to state questions or conclusions of law, no response is required, and such matters of law are respectfully referred to the Court.

**As to “The Transfers”**

32. Deny having knowledge or information sufficient to form a belief as to the truth of each and every allegation, except admit that an account identified as Account No. 1ZB268 (“Account”) was maintained with BLMIS and that, upon information and belief, certain documents related to the Account were executed and delivered to BLMIS.

33. Deny having knowledge or information sufficient to form a belief as to the truth of each and every allegation, except admit that deposits and transfers were made into the Account.

34. Deny each and every allegation, and state that the entire sum of \$5,000,000 that was withdrawn from the Account on or about July 24, 2007, was immediately reinvested back into BLMIS through third-party feeder fund Lakeview Investment, LP (“Lakeview”) and thereafter remained invested with BLMIS until all of it was lost as a result of Madoff’s fraud. Defendants, therefore, did not actually receive any fictitious profits and, in fact, lost money as a

result of Madoff's fraud.

35. Deny each and every allegation, and state that the entire sum of \$5,000,000 that was withdrawn from the Account on or about July 24, 2007, was immediately reinvested back into BLMIS through third-party feeder fund Lakeview and thereafter remained invested with BLMIS until all of it was lost as a result of Madoff's fraud. Defendants, therefore, did not actually receive any fictitious profits and, in fact, lost money as a result of Madoff's fraud.

36. Deny each and every allegation, and respectfully refer the Court to the relevant account documents and bank statements for their full contents and meanings.

37. Deny each and every allegation, except admit that the sum of \$5,000,000 was withdrawn from the Account on or about July 24, 2007 only for the sole purpose of reinvesting this entire sum back into BLMIS, and further state that this entire sum was then in fact immediately reinvested back into BLMIS through third-party feeder fund Lakeview and thereafter remained invested with BLMIS until all of it was lost as a result of Madoff's fraud. Defendants, therefore, did not actually receive any fictitious profits and, in fact, lost money as a result of Madoff's fraud.

38. Deny each and every allegation, except admit that the sum of \$500,000 was withdrawn from the Account on or about January 2, 2008.

39. Deny each and every allegation, except admit that the sum of \$1,500,000 was withdrawn from the Account on or about September 25, 2008.

40. Deny each and every allegation. Insofar as the allegations purport to state questions or conclusions of law, no response is required, and such matters of law are respectfully referred to the Court.

**As to “Customer Claims”**

41. Admit that a customer claim designated as Claim Number 013424 (“Customer Claim”) was filed with the Trustee.
42. Admit that a Notice of Trustee’s Determination of Claim (“Determination”) was issued with respect to the Customer Claim on or about August 28, 2009.
43. Admit that an objection to the Determination was filed.
44. Deny having knowledge or information sufficient to form a belief as to the truth of each and every allegation, and respectfully refer the Court to the order in question for its full contents and meanings.
45. Deny having knowledge or information sufficient to form a belief as to the truth of each and every allegation. Insofar as the allegations purport to state questions or conclusions of law, no response is required, and such matters of law are respectfully referred to the Court.
46. Deny each and every allegation. Insofar as the allegations purport to state questions or conclusions of law, no response is required, and such matters of law are respectfully referred to the Court.

**As to “Count One”**

47. Repeat and reallege each and every allegation, admission, and denial made in response to the paragraphs of the FAC which are referred to in this paragraph.
48. Deny each and every allegation, except admit that withdrawals were made from the Account within the two-year period prior to December 11, 2008.
49. Deny each and every allegation. Insofar as the allegations purport to state

questions or conclusions of law, no response is required, and such matters of law are respectfully referred to the Court.

50. Deny having knowledge or information sufficient to form a belief as to the truth of each and every allegation. Insofar as the allegations purport to state questions or conclusions of law, no response is required, and such matters of law are respectfully referred to the Court.

51. Deny each and every allegation, and state that the entire sum of \$5,000,000 that was withdrawn from the Account on or about July 24, 2007, was immediately reinvested back into BLMIS through third-party feeder fund Lakeview and thereafter remained invested with BLMIS until all of it was lost as a result of Madoff's fraud. Defendants, therefore, did not actually receive any fictitious profits and, in fact, lost money as a result of Madoff's fraud.

52. Deny each and every allegation. Insofar as the allegations purport to state questions or conclusions of law, no response is required, and such matters of law are respectfully referred to the Court.

53. Deny each and every allegation. Insofar as the allegations purport to state questions or conclusions of law, no response is required, and such matters of law are respectfully referred to the Court.

#### **AFFIRMATIVE DEFENSES**

A. Defendants assert the following affirmative defenses and reserve the right to amend this answer to assert other and further defenses when and if, in the course of investigation, discovery, or preparation for trial, it becomes appropriate to do so.

B. By identifying their allegations as "defenses", defendants do not excuse or

relieve the Trustee of his burden of proving all elements of his claim under the applicable standard of proof. Defendants do not undertake or assume any burden that properly rests with the Trustee and do not suggest that the Trustee does not bear the burden of proof with respect to such matters or that such matters are not elements that the Trustee must establish in order to make out a prima facie case on his claim against defendants.

C. In the event that subsequent legal developments further limit or otherwise alter the claims available to the Trustee, defendants hereby raise each and every defense at law, in equity, or otherwise, available under any and all federal and state statutes, laws, rules, and regulations. Defendants further adopt and incorporate by reference any and all other defenses asserted or to be asserted by any other defendant or party-in-interest in pending adversary proceedings in the BLMIS SIPA liquidation proceeding to the extent that defendants are similarly situated and may properly assert such defense.

D. Defendants reserve and assert all affirmative defenses available under applicable federal or state law, including, without limitation, the Federal Rules of Bankruptcy Procedure, the Federal Rules of Civil Procedure, and the New York Uniform Commercial Code, and reserve the right to assert other defenses and claims when and if it becomes appropriate to do so in this action.

E. The affirmative defenses set forth below are asserted cumulatively and in the alternative.

#### **First Affirmative Defense**

The FAC fails to state a cause of action upon which relief may be granted.

### **Second Affirmative Defense**

Pursuant to Stern v. Marshall, 131 S.Ct. 2594 (2011) and other Supreme Court precedent, this Court “may not finally decide avoidance actions except conceivably in the process of resolving identical claims under § 502(d)[.]” See In re Madoff Sec., 490 B.R. at 55. The Trustee has not asserted a claim under 11 U.S.C. § 502(d) in this adversary proceeding. Defendants do not consent to the adjudication and entry of a final order and judgment in this adversary proceeding by this Court. Accordingly, this Court does not have the power or jurisdiction to “finally decide” this adversary proceeding.

### **Third Affirmative Defense**

Defendants demand a trial by jury and do not consent to such a trial in this Court.

### **Fourth Affirmative Defense**

The Trustee lacks standing to bring a claim against defendants.

### **Fifth Affirmative Defense**

The Trustee has no authority or jurisdiction to bring a claim against defendants because the conditions of SIPA § 78fff-2(c)(3) have not been met. The Trustee has not established that there are insufficient funds in the BLMIS estate to pay all the claims specified in SIPA § 78fff-2(c)(1)(A) – (D).

### **Sixth Affirmative Defense**

The transfers at issue are not avoidable because the funds were held in trust by BLMIS and were not property in which BLMIS had a legal interest.

### **Seventh Affirmative Defense**

BLMIS incurred debts and obligations to the customer under contract law and

other applicable non-bankruptcy laws and rules. The transfers at issue were made on account of and constituted satisfaction of such antecedent debts or obligations.

**Eighth Affirmative Defense**

The entire sum of \$5,000,000 that was withdrawn from the Account on or about July 24, 2007, was immediately reinvested back into BLMIS through third-party feeder fund Lakeview and thereafter remained invested with BLMIS until all of it was lost as a result of Madoff's fraud. Defendants, therefore, did not actually receive any fictitious profits and, in fact, lost money as a result of Madoff's fraud. The Trustee's attempt to recover any portion of this money from defendants even though all of it had been returned to BLMIS and subsequently lost as a result of Madoff's fraud is unreasonable and unconscionable. Under these circumstances, the Court should exercise its equitable powers under 11 U.S.C. § 105(a) and dismiss the Trustee's claim.

**Ninth Affirmative Defense**

The entire sum of \$5,000,000 that was withdrawn from the Account on or about July 24, 2007, was immediately reinvested back into BLMIS through third-party feeder fund Lakeview and thereafter remained invested with BLMIS until all of it was lost as a result of Madoff's fraud. Defendants, therefore, did not actually receive any fictitious profits and, in fact, lost money as a result of Madoff's fraud. Under these circumstances, the Court should exercise its equitable powers under 11 U.S.C. § 105(a) and grant defendants an "equitable credit" in the full amount (i.e., \$5,000,000) that they had returned to BLMIS through their Lakeview investment.

**Tenth Affirmative Defense**

The entire sum of \$5,000,000 that was withdrawn from the Account on or about July 24, 2007, was immediately reinvested back into BLMIS through third-party feeder fund Lakeview and thereafter remained invested with BLMIS until all of it was lost as a result of Madoff's fraud. Defendants, therefore, did not actually receive any fictitious profits and, in fact, lost money as a result of Madoff's fraud. The Trustee's attempt to recover from defendants money which they had thus already returned to the BLMIS estate violates the single satisfaction rule codified at 11 U.S.C. § 550(d), which bars recovery from a transferee where the value of the transferred property had already been returned to the estate.

**Eleventh Affirmative Defense**

The entire sum of \$5,000,000 that was withdrawn from the Account on or about July 24, 2007, was immediately reinvested back into BLMIS through third-party feeder fund Lakeview and thereafter remained invested with BLMIS until all of it was lost as a result of Madoff's fraud. Defendants, therefore, did not actually receive any fictitious profits and, in fact, lost money as a result of Madoff's fraud. Accordingly, defendants are entitled to an offset or credit under the theory of recoupment in the full amount (i.e., \$5,000,000) that they had returned to BLMIS through their Lakeview investment.

**Twelfth Affirmative Defense**

The entire sum of \$5,000,000 that was withdrawn from the Account on or about July 24, 2007, was immediately reinvested back into BLMIS through third-party feeder fund Lakeview and thereafter remained invested with BLMIS until all of it was lost as a result of Madoff's fraud. Defendants, therefore, did not actually receive any fictitious profits and, in fact,

lost money as a result of Madoff's fraud. Accordingly, defendants are entitled to a set-off under 11 U.S.C. § 553 in the full amount (i.e., \$5,000,000) that they had returned to BLMIS through their Lakeview investment

#### **Thirteenth Affirmative Defense**

The Trustee failed to adequately plead that each of the transfers at issue was made “with actual intent to hinder, delay, or defraud” as required under 11 U.S.C. § 548(a)(1)(A).

#### **Fourteenth Affirmative Defense**

The Trustee's claim is barred, in whole or in part, by the doctrines of waiver, laches, and/or estoppel.

#### **Fifteenth Affirmative Defense**

The transfers at issue, to the extent they were actually received by defendants, were taken for value, in good faith, and without knowledge of their voidability. Accordingly, they are not avoidable or recoverable under 11 U.S.C. §§ 548(c) and/or 550.

#### **Sixteenth Affirmative Defense**

The transfers at issue, to the extent they were actually received by defendants, were taken without actual fraudulent intent and for value. Accordingly, they are not avoidable or recoverable under 11 U.S.C. §§ 548 and/or 550.

#### **Seventeenth Affirmative Defense**

. The Trustee's claim is subject to setoff or other equitable adjustment because defendants, to the extent they actually received the transfers at issue, received them in good faith, without knowledge of the alleged fraud, and in payment of an antecedent debt and/or on account of obligations owed by BLMIS for, inter alia: (a) amounts contractually due to a customer of

BLMIS under New York law for the balances shown on prior customer account statements and related documents; (b) rescission remedies, including damages and interest, for fraud and misrepresentation pursuant to federal and state law; (c) the time value of money; (d) unjust enrichment; (e) damages for breach of fiduciary duty; and/or (f) money had and received.

#### **Eighteenth Affirmative Defense**

The Trustee's claim is barred to the extent the Trustee attempts to directly or indirectly avoid transfers or inter-account transfers that occurred more than two years before December 11, 2008.

#### **Nineteenth Affirmative Defense**

The Trustee's claim is barred to the extent the Trustee failed to properly credit inter-account transfers made to the Account. To the extent the inter-account transfers occurred outside any applicable statutory reach-back period for avoidance and/or recovery of transfers, they may not be ignored and/or treated as if they had no value as the Trustee has no power to avoid such inter-account transfers.

#### **Twentieth Affirmative Defense**

By not accounting for the time value of money by making an interest adjustment or other adjustment, the Trustee incorrectly calculated the "value" represented by the principal investments in the Account and the amount of fictitious profits, if any, that may be avoided under § 548(a)(1)(A).

#### **Twenty-First Affirmative Defense**

By not adjusting for inflation, the Trustee incorrectly calculated the "value" represented by the principal investments in the Account and the amount of fictitious profits, if

any, that may be avoided under § 548(a)(1)(A).

**Twenty-Second Affirmative Defense**

The Trustee is not entitled to recover any prejudgment interest on any recovery that he may obtain in this adversary proceeding. But if it is found that the Trustee is entitled to prejudgment interest, he is only entitled to such interest at the federal rate of interest on judgments, and only from a date that is no earlier than the date when this adversary proceeding was commenced.

**Twenty-Third Affirmative Defense**

The Trustee's claim is barred because the Trustee failed to sufficiently trace the funds at issue from BLMIS to defendants.

**Twenty-Fourth Affirmative Defense**

The Account is a trust account and, as such, is exempt from the Trustee's claim under applicable state law.

**Twenty-Fifth Affirmative Defense**

The Trustee's claim should be dismissed due to defendants' justifiable reliance on the activities of governmental and regulatory bodies, such as the SEC and SIPC, to oversee and monitor the activities and business of BLMIS.

**Twenty-Sixth Affirmative Defense**

The Trustee's claim is barred by intervening or superseding events, factors, occurrences, or conditions over which defendants had no control.

**Twenty-Seventh Affirmative Defense**

BLMIS was not formed until January 2001. The orders of the District Court and

the Bankruptcy Court relating to the consolidation of the estates of BLMIS and Madoff as an individual or sole proprietor of his securities business do not confer standing or authority upon the Trustee to avoid or recover, directly or indirectly, fraudulent transfers made by Madoff prior to the formation of BLMIS.

#### **Twenty-Eighth Affirmative Defense**

The Trustee cannot recover the initial transfers from Mr. Lustig individually on the theory that he was the beneficiary of those transfers.

#### **Twenty-Ninth Affirmative Defense**

The Trustee's claim is subject to setoff or other equitable adjustment to the extent that any of the funds withdrawn from the Account were used to pay tax obligations imposed on alleged fictitious profits by federal, state, and/or local governmental taxing authorities.

**DEMAND FOR JUDGMENT**

WHEREFORE, defendant the Lustig Trust and Mr. Lustig, individually and in his capacity as Trustee for the Lustig Trust, respectfully demand judgment against the Trustee: (1) dismissing the First Amended Complaint and denying all relief requested therein with costs and disbursements in favor of defendants; (2) reimbursing defendants for the attorneys' fees and expenses that they have incurred; and (3) granting such other, further, and different relief as this Court may deem just and proper.

Dated: New York, New York  
May 2, 2016

Respectfully submitted,  
LAW OFFICE OF  
RICHARD E. SIGNORELLI

By: /s/ Richard E. Signorelli

---

Richard E. Signorelli  
Bryan Ha  
799 Broadway, Suite 539  
New York, NY 10003  
Telephone: 212 254 4218  
Facsimile: 212 254 1396  
rsignorelli@nycLITIGATOR.com<sup>SM</sup>  
www.nycLITIGATOR.com<sup>SM</sup>

Attorneys for Defendants The Lustig Family  
1990 Trust and David I. Lustig, individually  
and in his capacity as Trustee for The Lustig  
Family 1990 Trust

FILING AND SERVICE VIA ELECTRONIC FILING

## EXHIBIT 6

UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X  
In re:

SECURITIES INVESTOR PROTECTION  
CORPORATION,

Plaintiff-Applicant,

– against –

BERNARD L. MADOFF INVESTMENT  
SECURITIES LLC,

Defendant.  
-----X

In re:

BERNARD L. MADOFF,

Debtor.  
-----X

IRVING PICARD, Trustee for the Liquidation  
of Bernard L. Madoff Investment Securities  
LLC,

Plaintiff,

– against –

THE LUSTIG FAMILY 1990 TRUST and  
DAVID I. LUSTIG, individually and in his  
Capacity as Trustee for The Lustig Family  
1990 Trust,

Defendants.  
-----X

IRVING PICARD, Trustee for the Liquidation  
of Bernard L. Madoff Investment Securities  
LLC,

Plaintiff,

– against –

DAVID IVAN LUSTIG,

Adv. Proc. No. 08-01789 (SMB)

SIPA Liquidation  
(Substantively Consolidated)

Adv. Proc. No. 10-04417 (SMB)

Adv. Proc. No. 10-04554 (SMB)

Defendant.

:  
:  
-----X

**MEMORANDUM DECISION GRANTING PARTIAL SUMMARY  
JUDGMENT STRIKING CERTAIN AFFIRMATIVE DEFENSES**

**A P P E A R A N C E S:**

**BAKER & HOSTETLER LLP**

*Attorneys for Plaintiff Irving Picard, Trustee*

45 Rockefeller Plaza

New York, NY 10111

David J. Sheehan, Esq.

Nicholas J. Cremona, Esq.

Dean D. Hunt, Esq.

Of Counsel

**LAW OFFICE OF RICHARD E. SIGNORELLI**

*Attorney for Defendants*

799 Broadway, Suite 539

New York, NY 10003

Richard E. Signorelli, Esq.

Bryan Ha, Esq.

Of Counsel

**STUART M. BERNSTEIN**

**United States Bankruptcy Judge:**

The defendants David Ivan Lustig (“Lustig”) and the Lustig Family 1990 Trust (“Lustig Trust,” and collectively with Lustig, the “Lustig Defendants”) withdrew approximately \$7 million in fictitious profits from their customer accounts maintained at Bernard L. Madoff Investment Securities LLC (“BLMIS”). They claim that they reinvested the withdrawn sums indirectly back into BLMIS through a series of transfers among other feeder funds that invested with Madoff, and all of the reinvested money was lost as a result of Madoff’s Ponzi scheme.

Irving H. Picard (the “Trustee”), as trustee for the liquidation of BLMIS under the Securities Investor Protection Act, 15 U.S.C. §§ 78aaa, *et seq.* (“SIPA”), sued the Lustig Defendants in separate adversary proceedings to recover the fictitious profits they withdrew. The Lustig Defendants asserted numerous affirmative defenses, several of which revolve around the concept that they are entitled to a credit for the amounts that others reinvested into BLMIS. The Trustee has moved to strike those defenses, (*Notice of Trustee’s Motion to Strike Affirmative Defenses*, dated Feb. 28, 2017 (ECF Doc. # 73)),<sup>1</sup> and the parties have agreed to treat the Trustee’s motion as a motion for partial summary judgment. For the reasons that follow, the Trustee’s motion is granted.

### **BACKGROUND**

The background to Madoff’s Ponzi scheme has been recounted in numerous opinions, *e.g.* *SIPC v. BLMIS (In re BLMIS)*, 424 B.R. 122, 125-32 (Bankr. S.D.N.Y. 2010), *aff’d*, 654 F.3d 229 (2d Cir. 2011), *cert. denied*, 133 S. Ct. 25 (2012), and need not be restated here as they are not in dispute on this motion. The Lustig Defendants maintained separate customer accounts with BLMIS. Between June 26, 2007 and September 25, 2008, the Lustig Trust withdrew \$8.8 million from BLMIS Account 1ZB268, of which \$4,241,336 constituted fictitious profits. On July 25, 2007, Lustig withdrew \$2 million from BLMIS Account 1ZR297, of which \$1,863,225 constituted fictitious profits.

According to the Lustig Defendants, they reinvested all of the withdrawn fictitious profits, totaling approximately \$7 million, with Lakeview Investment, LP

---

<sup>1</sup> The parties filed identical papers in each adversary proceeding. Unless indicated otherwise, all ECF references are to the docket in Adversary Proceeding No. 10-04417.

(“Lakeview”).<sup>2</sup> They further allege that through a series of transfers among other funds and financial institutions, all of the withdrawn fictitious profits were eventually reinvested in BLMIS and ultimately lost. Specifically, the approximate \$4.2 million withdrawn by the Lustig Trust, in the end, found its way into the customer account maintained by the Rye Select Broad Market Fund (“Rye Broad Market”), part of the Tremont Group. The approximate \$2 million in fictitious profits withdrawn by Lustig was subsequently deposited by the Senator Fund (“Senator,” and together with Rye Broad Market, the “Funds”) in its own account at BLMIS.

The Trustee commenced an adversary proceeding against the Lustig Trust on November 30, 2010, (*Complaint*, dated Nov. 12, 2010 (ECF Doc. # 1)), and sued Lustig one day later. (*Complaint*, dated Nov. 12, 2010 (ECF Adv. Proc. No. 10-04554 Doc # 1).) The Trustee concedes that the Lustig Defendants were good faith transferees entitled to the protection of the safe harbor under 11 U.S.C. § 546(e). Accordingly, he seeks to avoid and recover the fictitious profits withdrawn within two years of the December 11, 2008 filing date of the SIPA proceeding as intentional fraudulent transfers pursuant to 11 U.S.C. § 548(a)(1)(A).

The Lustig Defendants denied the material allegations in the *Complaints*, and in relevant part, asserted identical affirmative defenses. (*See Answer*, dated May 2, 2016 (ECF Doc. # 58); *Answer*, dated May 2, 2016 (ECF Adv. Proc. No. 10-04554 Doc. # 61).) The Eighth through Twelfth Affirmative Defenses alleged that the entire sum that was

---

<sup>2</sup> The transfers are summarized in the *Letter from Richard E. Signorelli, Esq. and Bryan Ha, Esq. to the Court*, dated Jan. 6, 2017 (ECF Doc. # 66), and purport to be documented in exhibits attached to the *Declaration of Bryan Ha*, dated Mar. 31, 2017 (ECF Doc. # 78).

withdrawn by the Lustig Defendants was reinvested with BLMIS through Lakeview, the reinvested sums were lost as a result of Madoff's fraud, the Lustig Defendants did not actually receive any fictitious profits, and in fact, they lost money as a result of Madoff's fraud. Based on these allegations, the Lustig Defendants contend that the Court should use its equitable powers to dismiss the claims, (Eight Affirmative Defense), and/or grant them an "equitable credit," (Ninth Affirmative Defense), the claims are barred by the single satisfaction rule under 11 U.S.C. § 550(d), (Tenth Affirmative Defense), they are entitled to a credit under the theory of recoupment, (Eleventh Affirmative Defense), and they are entitled to a set off under 11 U.S.C. § 553 (Twelfth Affirmative Defense). The Lustig Defendants subsequently withdrew the set off defense, (*Defendants' Memorandum of Law in Opposition to Trustee's Motion to Strike Certain Affirmative Defenses*, dated Mar. 31, 2017 ("*Lustig Memo*"), at 17 n. 5 (ECF Doc. # 76)), and the motion directed at the Twelfth Affirmative Defense requires no further consideration.

The Trustee moved to strike these defenses as legally insufficient pursuant to Rule 12(f) of the Federal Rules of Civil Procedure. The Lustig Defendants submitted a substantial amount of documentary evidence and Lustig's affidavit in opposition, and at the Court's suggestion, the parties agreed to treat the motion as one for partial summary judgment dismissing these defenses. To expedite consideration of the legal issues, I will assume solely for the purposes of the motion that the series of transfers occurred as the Lustig Defendants claim, the fictitious profits they withdrew were subsequently deposited by the Funds in their own BLMIS accounts, and the value of those accounts was effectively zero when the Madoff scandal was revealed.

Through his motion, the Trustee contends that the Bankruptcy Code does not authorize equitable defenses or an “equitable credit” to offset a fraudulent transfer. (*Memorandum of Law in Support of the Trustee’s Motion to Strike Affirmative Defenses*, dated Feb. 28, 2017 (“*Trustee Memo*”), at 5-7 (ECF Doc. # 74).) Further, the single satisfaction rule codified in 11 U.S.C. § 550(d) is inapplicable because we are dealing with separate initial transfers to the Lustig Defendants and the Funds, (*id.* at 7-8), and the doctrine of recoupment does not apply because the Trustee’s claims and the Lustig Defendants’ claims arise out of different transactions. (*Id.* at 9-10.) The Lustig Defendants’ opposition takes the contrary view on each of these points. (*See Lustig Memo* at 22-40.) The Trustee’s reply emphasized that “[a]llowing Defendants to avoid liability in these adversary proceedings because they chose to make an investment in Lakeview with the money Defendants withdrew from their BLMIS accounts would give Defendants preference over BLMIS customers by allowing Defendants’ alleged losses to be treated as a claim for customer property.” (*Reply in Support of the Trustee’s Motion to Strike Affirmative Defenses*, dated Apr. 14, 2017 (“*Trustee Reply*”), at 1 (ECF Doc. # 79).) Furthermore, the money collected from the Funds was for the benefit of all net losers, not the Lustig Defendants. (*Id.* at 5.)

## **DISCUSSION**

### **A. Introduction**

Bankruptcy Code § 548(a) authorizes a bankruptcy trustee to avoid a fraudulent transfer made by the debtor, and SIPA extends that authority to the Trustee. 15 U.S.C. § 78fff-2(c)(3) (“[T]he trustee may recover any property transferred by the debtor which, except for such transfer, would have been customer property if and to the extent that

such transfer is voidable or void under the provisions of Title 11”). If the trustee avoids the transfer under § 548, Bankruptcy Code § 550(a) permits him to recover the initial transfer or its value, “if the court so orders,” from the initial transferee, any subsequent transferees or the entity for whose benefit the transfer was made. The purpose of § 550(a) is to restore the estate to the condition it would have been in if the transfer had never occurred. *Hirsch v. Gersten (In re Centennial Textiles, Inc.)*, 220 B.R. 165, 176 (Bankr. S.D.N.Y. 1998), *supplemented by* 220 B.R. 177 (Bankr. S.D.N.Y. 1998); *accord Nisselson v. Salim (In re Big Apple Volkswagen, LLC)*, Adv. Proc. No. 11–2251 (JLG), 2016 WL 1069303, at \*14 (Bankr. S.D.N.Y. Mar. 17, 2016); 5 ALAN N. RESNICK & HENRY J. SOMMER, COLLIER ON BANKRUPTCY ¶ 550.02[3], at 550-10 (16th ed. 2016) (“COLLIER”). The choice under § 550(a) between ordering the return of the property or its value gives the Court flexibility to grant the appropriate remedy when the value is uncertain or has changed since the transfer. “The factors which the Court should consider in determining whether to order turnover of the property rather than payment of the value include whether the value of the property (1) is contested; (2) is not readily determinable; or (3) is not diminished by conversion or depreciation.” *Centennial Textiles*, 220 B.R. at 177; *accord Andrew Velez Constr., Inc. v. Consol. Edison Co. of New York, Inc. (In re Andrew Velez Constr., Inc.)*, 373 B.R. 262, 274 (Bankr. S.D.N.Y. 2007); 5 COLLIER ¶ 550.02[3], at 550-10 to 550-11. Where the transfer involves cash, the Court’s discretion does not come into play.

Finally, “[t]he trustee is entitled to only a single satisfaction under [550(a)].” 11 U.S.C. § 550(d). Thus, although the trustee can sue many defendants, his total recovery is limited to the initial transfer or its value. For example, if the debtor transferred \$1.00

fraudulently, and that \$1.00 was transferred and re-transferred fifty times, the Trustee can sue the initial transferee and the fifty subsequent transferees, but can only recover \$1.00.

The Lustig Defendants do not dispute, again for the purposes of the Trustee's motion, that the transfers of fictitious profits they received are avoidable under Bankruptcy Code § 548(a).<sup>3</sup> Accordingly, the question is whether the Trustee's recovery under Bankruptcy Code § 550(a) is or should be limited based on the defenses they have asserted.

## **B. The Equitable Defenses**

The Eighth and Ninth Affirmative Defenses ask the Court to use its general equity powers under § 105(a)<sup>4</sup> to dismiss the Trustee's claims or grant the Lustig Defendants an "equitable credit" in the full amount they invested in Lakeview which, we will assume, was reinvested in BLMIS by the Funds. Admittedly, no such defenses are specified in the Bankruptcy Code. Nor does the Bankruptcy Code permit the Court to limit the Trustee's recovery of a cash transfer for equitable reasons. The Lustig Defendants nevertheless argue that this equitable power exists by virtue of Bankruptcy Code § 105(a).

---

<sup>3</sup> Although an initial transferee who received the transfer in good faith for value given to the debtor may defend the avoidance claim on that basis, 11 U.S.C. § 548(c), the Lustig Defendants do not concede that they did not give value, and have asserted this defense in their Fifteenth Affirmative Defense. (*Answer*, dated May 2, 2016, at 14 (ECF Doc. # 58); *Answer*, dated May 2, 2016, at 13-14 (ECF Adv. Proc. No. 10-04554 Doc. # 61).)

<sup>4</sup> Section 105(a) states in relevant part that "[t]he court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title."

We are frequently reminded that the equitable powers of the bankruptcy court “must and can only be exercised within the confines of the Bankruptcy Code.” *Norwest Bank Worthington v. Ahlers*, 485 U.S. 197, 206, (1988); *accord Law v. Siegel*, 134 S. Ct. 1188, 1194 (2014); *Solow v. Kalikow (In re Kalikow)*, 602 F.3d 82, 96 (2d Cir. 2010); *Smart World Techs., LLC v. Juno Online Servs., LLC (In re Smart World Techs., LLC)*, 423 F.3d 166, 184 (2d Cir. 2005); *Schwartz v. Aquatic Dev. Grp., Inc. (In re Aquatic Dev. Grp., Inc.)*, 352 F.3d 671, 680 (2d Cir. 2003) (Straub, J., concurring). Section 105(a) “does not authorize the bankruptcy courts to create substantive rights that are otherwise unavailable under applicable law, or constitute a roving commission to do equity,” *Kalikow*, 602 F.3d at 96 (citation and internal quotation marks omitted); *New England Dairies, Inc. v. Dairy Mart Convenience Stores, Inc. (In re Dairy Mart Convenience Stores, Inc.)*, 351 F.3d 86, 92 (2d Cir. 2003) (quoting *United States v. Sutton*, 786 F.2d 1305, 1308 (5th Cir.1986)), and extends only to the exercise of equity “in carrying out the *provisions* of the Bankruptcy Code, rather than to further the purposes of the Code generally, or otherwise to do the right thing.” *Dairy Mart*, 351 F.3d at 92 (emphasis in original); *accord Kalikow*, 602 F.3d at 97.

Here, the credits that the Lustig Defendants seek are inconsistent with express provisions of the Bankruptcy Code and SIPA which give the credit they seek to the entity that gave the value to the debtor. Bankruptcy Code § 548(c) provides a defense to the extent that the initial transferee takes in good faith and “gave value to the debtor in exchange for such transfer or obligation.” The Funds gave the value through the deposits that the Lustig Defendants are trying to conscript for their own benefit, and the Funds are entitled to the credit for those deposits under § 548(c). Similarly, the Funds

received a credit for those deposits under SIPA. The Funds are net losers, and under the “Net Investment Method” approved by the Second Circuit, *see In re BLMIS*, 654 F.3d 229, 239 (2d Cir. 2011), *cert. denied*, 133 U.S. 24 (2012), they are entitled to net equity claims based on the difference between the amount they deposited and the amount they withdrew from their BLMIS accounts. The deposits increased the allowable net equity claims asserted by the Funds, and the Lustig Defendants’ invocation of equity would force the BLMIS estate to give a second round of credits based on the same deposits.

Moreover, the credits given to the Funds on account of these deposits are not just theoretical; the Trustee has distributed cash to the Funds based on the deposits. The Trustee sued the Tremont Group, including Rye Broad Market, and in July 2011, the parties reached a settlement.<sup>5</sup> The Trustee alleged that the entire Tremont Group had withdrawn \$2.1 billion during the life of their accounts, of which Rye Broad Market had withdrawn \$384,140,000.00. (*Tremont Settlement Agreement* at ¶ G.) Rye Broad Market was nonetheless a substantial net loser to the tune of \$1,639,171,625.00. (*Id.* at ¶¶ G, T.) Under the settlement, the Tremont Group agreed to pay the Trustee \$1 billion, (*id.* at ¶ 2), and the Trustee agreed, among other things, to allow Rye Broad Market’s

---

<sup>5</sup> A copy of the settlement agreement (“*Tremont Settlement Agreement*”) is annexed as Exhibit A to the *Motion for Entry of Order Pursuant to Section 105(a) of the Bankruptcy Code and Rules 2002 and 9019 of the Federal Rules of Bankruptcy Procedure Approving a Settlement Agreement by and Between the Trustee and Tremont Group Holdings, Inc., Tremont Partners, Inc., Tremont (Bermuda) Limited, Rye Select Broad Market Fund, L.P., Rye Select Broad Market Prime Fund, L.P., Rye Select Broad Market Portfolio Limited, Rye Select Broad Market Insurance Fund, L.P., Rye Select Broad Market XI Fund, L.P., Tremont Arbitrage Fund, L.P., Tremont Arbitrage Fund Ireland, Tremont Emerging Markets Fund - Ireland, Tremont Equity Fund -Ireland, Tremont International Insurance Fund, L.P., Tremont Long/Short Equity Fund, L.P., Tremont Market Neutral Fund, L.P., Tremont Market Neutral Fund II, L.P., Tremont Market Neutral Fund Limited, Tremont Opportunity Fund Limited, Tremont Opportunity Fund II, L.P., Tremont Opportunity Fund III, L.P., Rye Select Equities Fund, Tremont Multi Manager Fund, and LifeInvest Opportunity Fund LDC, Oppenheimer Acquisition Corp., MassMutual Holding LLC, Massachusetts Mutual Life Insurance Company, Robert I. Schulman, and Rye Select Broad Market Insurance Portfolio LDC*, dated July 28, 2011 (“*Tremont Settlement Motion*”) (ECF Adv. Proc. No. 10-05310 Doc. # 17).

customer claim in the sum of \$1,647,687,625.00. (*Id.* at ¶ 5.) In addition, the customer claims of Rye Broad Market and Portfolio Limited, another settling member of the Tremont Group, were increased by the aggregate amount of \$800 million pursuant to 11 U.S.C. § 502(h)<sup>6</sup> on account of the \$1 billion settlement payment. (*See id.*; *Tremont Settlement Motion* at ¶ 18.)

The Trustee also sued Senator to recover \$95 million withdrawn over the life of its account and to disallow its customer net equity claim. In November 2014, the parties reached a settlement.<sup>7</sup> Senator, like Rye Broad Market, was a net loser, and at the time of the settlement, its net equity claim was \$162,249,980.00. (*Senator Settlement Agreement* at ¶ E.) Senator agreed to pay the Trustee \$95 million, (*id.* at ¶ 1), and the Trustee agreed to allow Senator's increased customer claim in the amount of \$238,753,482.00. (*Id.* at ¶ 2.) The latter sum consisted of 88.6% of Senator's net equity claim and 100% of the settlement payment allowed under Bankruptcy Code § 502(h). (*Senator Settlement Motion* at ¶ 13.)

Through eight interim distributions, the Funds as well as other net losers have received slightly more than 60% of the allowed amounts of their claims. (*See Motion for an Order Approving Eighth Allocation of Property to the Fund of Customer Property*

---

<sup>6</sup> Section 502(h) states that "[a] claim arising from the recovery of property under section 522, 550, or 553 of this title shall be determined, and shall be allowed under subsection (a), (b), or (c) of this section, or disallowed under subsection (d) or (e) of this section, the same as if such claim had arisen before the date of the filing of the petition." In other words, Rye Broad Market and Portfolio Limited received an aggregate, allowed unsecured claim for 80% of the amount paid toward the settlement.

<sup>7</sup> A copy of the settlement agreement ("*Senator Settlement Agreement*") is annexed as Exhibit A to the *Motion for Entry of Order Pursuant to Section 105(a) of the Bankruptcy Code and Rules 2002 and 9019 of the Federal Rules of Bankruptcy Procedure Approving a Settlement Agreement by and Between the Trustee and Senator Fund SPC*, dated Nov. 18, 2014 ("*Senator Settlement Motion*") (ECF Adv. Proc. No. 09-01364 Doc. # 339).



Trustee recovered the entire initial transfers made to the Funds, Bankruptcy Code § 550(d) does not foreclose the Trustee from recovering the full amount of the initial transfers made to the Lustig Defendants.

### **C. Recoupment**

The Eleventh Affirmative Defense relies on the doctrine of recoupment. Recoupment rights are determined pursuant to nonbankruptcy law. *New York State Elec. & Gas Corp. v. McMahon (In re McMahon)*, 129 F.3d 93, 96 (2d Cir. 1997). Under New York law,

[r]ecoupment means a deduction from a money claim through a process whereby cross demands arising out of the same transaction are allowed to compensate one another and the balance only to be recovered. Of course, such a process does not allow one transaction to be offset against another, but only permits a transaction which is made the subject of suit by a plaintiff to be examined in all its aspects, and judgment to be rendered that does justice in view of the one transaction as a whole.

*Id.* (quoting *Nat'l Cash Register Co. v. Joseph*, 86 N.E.2d 561, 562 (N.Y. 1949)); accord *Westinghouse Credit Corp. v. D'urso*, 278 F.3d 138, 146 (2d Cir. 2002).

In bankruptcy, “recoupment seeks to avoid the unjust result that would occur if a debtor who has been overpaid pre-petition by a party in a contract is permitted post-petition to make a claim under the contract against that party without regard to the overpayment it has received.” *McMahon*, 129 F.3d at 96. Thus, it ignores the demarcation between pre and post-petition debits and credits. Nevertheless, “[i]n light of the Bankruptcy Code’s strong policy favoring equal treatment of creditors and bankruptcy court supervision over even secured creditors, the recoupment doctrine is a limited one and should be narrowly construed.” *McMahon*, 129 F.3d at 97.

Assuming that the doctrine of recoupment could ever serve as a defense to a fraudulent transfer claim, it is not available to the Lustig Defendants because the parties' claims arise from different transactions. The Trustee's claims against the Lustig Defendants arise from their withdrawal of fictitious profits from their BLMIS accounts. Their recoupment credit is based on their investment of the withdrawn funds in Lakeview which is an entirely different transaction. Even if one accepted that the credit arises from the Funds' reinvestment of money traceable back to those withdrawals, the reinvestment is still a separate transaction governed by whatever account agreements the Funds had with BLMIS.

#### **D. The Lustig Defendants' Authorities**

Finally, the Lustig Defendants' authorities are distinguishable. They rely mainly on two cases. In *Dobin v. Presidential Fin. Corp. of Delaware Valley (In re Cybridge Corp.)*, 312 B.R. 262 (D.N.J. 2004), the Cybridge Corporation ("Cybridge") entered into a pre-petition "factoring" agreement with Presidential Financial Corporation of Delaware Valley ("Presidential"). Presidential advanced up to 80% of the value of Cybridge's eligible accounts receivable, and Presidential's loan was secured, *inter alia*, by a first lien on the accounts receivable. Presidential collected the receivables from the customer and applied the payments to the outstanding debt. *Id.* at 265.

Cybridge filed a chapter 11 case, but did not list Presidential as a creditor or provide it with notice of the bankruptcy. As a result, Presidential continued to advance funds and collect the accounts receivable. *Cybridge*, 312 B.R at 265. During the chapter

11 period, Presidential collected \$163,847.00 but advanced \$192,200.00 in new loans.<sup>9</sup>

*Id.* Following the conversion, the chapter 7 trustee commenced an adversary proceeding to avoid and recover the post-petition collections as violative of 11 U.S.C. § 549(a).<sup>10</sup>

The Bankruptcy Court granted summary judgment and the District Court affirmed. It ruled that the recovery was barred by Bankruptcy Code § 550(d) which “empowers courts to prohibit a trustee from recovering under Section 550(a) from a transferee that has already returned to the estate that which was taken in violation of the Code.” *Cybridge*, 312 B.R. at 271. “Cash is fungible,” and Presidential had returned the cash it collected through new advances. This limited the trustee’s recovery to zero under Bankruptcy Code § 550(a) because the value of the transfer had already been repaid. *Id.* at 271-72. Finally, the grant of an “equitable credit” under Bankruptcy Code § 105(a) to limit the amount of recovery under § 550(a) did not conflict with the Bankruptcy Code. The equitable credit left the estate in the same position it would have been in but for the avoided transfer, and prevented the injustice of forcing Presidential to pay \$163,847.00 despite the fact that it was deceived into continuing the lending relationship post-

---

<sup>9</sup> It appears that Presidential collected accounts receivable after the case was converted to chapter 7. See *Cybridge*, 312 B.R. at 265.

<sup>10</sup> Section 549(a) provides:

(a) Except as provided in subsections (b) or (c) of this section, the trustee may avoid a transfer of property of the estate—

(1) that occurs after the commencement of the case; and

(2)(A) that is authorized only under section 303(f) or 542(c) of this title; or

(B) that is not authorized under this title or by the court.

petition during which it had advanced \$192,200.00 which it was likely never to recoup. In addition, it was forced to defend itself at considerable cost. *Id.* at 273.

The Lustig Defendants' other authority, *Bakst v. Sawran (In re Sawran)*, 359 B.R. 348 (Bankr. S.D. Fla. 2007), extended *Cybridge's* rationale to subsequent transferees. There, the debtor's father supported the debtor, and the debtor paid \$20,000.00 to her father from the proceeds of the settlement of a personal injury claim. When the father's health deteriorated and he could no longer care for the debtor, he transferred \$10,000.00 to his son and daughter-in-law and \$10,000.00 to his daughter, instructing them to pay the debtor's rent and living expenses. They paid an aggregate of \$12,000.00 to the debtor before the bankruptcy and an additional \$8,000.00 after the bankruptcy. *Id.* at 350-51.

The trustee sued the father, obtained a \$20,000 preference judgment, and sued the son, the son's wife and the daughter (collectively, the "Defendants") as subsequent transferees. Relying on *Cybridge*, the Bankruptcy Court concluded that permitting the Trustee to recover \$20,000.00 from the Defendants after they had returned \$12,000.00 to the debtor pre-petition would create a \$12,000.00 windfall that violated the single satisfaction rule under § 550(d). *Id.* at 353. The Defendants were also entitled to an equitable credit under Bankruptcy Code § 105(a). Granting the equitable credit was consistent with the Bankruptcy Code because the Defendants restored the debtor to the financial condition she would have been if the \$12,000.00 transfer had never occurred. *Id.* at 354. Further, the Defendants accepted the \$20,000, not for personal gain, but to

take care of the debtor after her father became incapacitated, and disbursed the money to the debtor at the father's request. *Id.*<sup>11</sup>

Assuming that the cases were correctly decided, they are distinguishable. In both cases, the party sued by the trustee had already returned part or all of the initial transfer to the debtor or the estate before the bankruptcy had been commenced or converted. These payments cured the diminution in the value and made the debtor or the estate whole. Moreover, the parties had acted in good faith, and in fact, Presidential had been duped into continuing to collect accounts receivable and advance fresh funds during the chapter 11.

Here, in contrast, the Lustig Defendants did not repay BLMIS, the Funds did and received the credit for those payments. Instead, the Lustig Defendants withdrew their funds, obtained complete dominion and control over the money and were free to use it as they saw fit. No one forced them to invest in Lakeview, and they are in no different economic position than any other customer who withdrew funds from his BLMIS account and invested those funds in a business that failed. In fact, they are in a better position; they have recovered a portion of their losses from Lakeview. (*See Lustig Memo* at 9 n. 2 & 14 n. 4.)<sup>12</sup> Finally, the payments recovered from the Funds under the settlements were for the benefit of all net losers. Granting the Lustig Defendants an

---

<sup>11</sup> In contrast, the Bankruptcy Court concluded that the Defendants were not entitled to a credit for the \$8,000.00 they transferred to the debtor post-petition. The Court did not rely on equity in reaching this conclusion. Instead, it performed a straight statutory analysis mandated by Bankruptcy Code § 550(a)(2), and concluded that the Defendants did not give value to the father in exchange for the subsequent transfer. The Bankruptcy Court did not explain the reason for the different analysis.

<sup>12</sup> The Lustig Defendants did not say how much they recovered from Lakeview, but stated that they provided the information to the Trustee, and the Trustee states that they received approximately \$800,000.00. (*Trustee Reply* at 2.)

equitable credit will potentially take money out of the pockets of the net losers and give it to them.

Accordingly, the Eighth through Eleventh Affirmative Defenses are stricken, and the Twelfth Affirmative Defense is withdrawn. Settle order on notice.

Dated: New York, New York  
June 1, 2017

/s/ *Stuart M. Bernstein*  
STUART M. BERNSTEIN  
United States Bankruptcy Judge

## EXHIBIT 7

**UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK**

SECURITIES INVESTOR PROTECTION  
CORPORATION,

Plaintiff-Applicant,

v.

BERNARD L. MADOFF INVESTMENT  
SECURITIES, LLC,

Defendant.

Adv. Pro. No. 08-01789 (SMB)

SIPA Liquidation

(Substantively Consolidated)

In re:

BERNARD L. MADOFF INVESTMENT  
SECURITIES LLC,

Debtor.

IRVING H. PICARD, Trustee for the Substantively  
Consolidated SIPA Liquidation of Bernard L.  
Madoff Investment Securities LLC and Bernard L.  
Madoff,

Plaintiff,

v.

THE LUSTIG FAMILY 1990 TRUST; and DAVID  
I. LUSTIG, individually and in his capacity as  
Trustee for The Lustig Family 1990 Trust,

Defendants.

Adv. Pro. No.: 10-04417 (SMB)

IRVING H. PICARD, Trustee for the Substantively  
Consolidated SIPA Liquidation of Bernard L.  
Madoff Investment Securities LLC and Bernard L.  
Madoff,

Plaintiff,

v.

DAVID IVAN LUSTIG,

Adv. Pro. No. 10-04554 (SMB)

Defendant.

**ORDER GRANTING PARTIAL SUMMARY JUDGMENT  
STRIKING AFFIRMATIVE DEFENSES**

On February 28, 2017, Irving H. Picard (“Trustee”), as trustee for the substantively consolidated liquidation of the business of Bernard L. Madoff Investment Securities, LLC under the Securities Investor Protection Act, 15 U.S.C. §§ 78aaa, *et seq.*, and the estate of Bernard L. Madoff filed his Motion to Strike Affirmative Defenses (“Motion to Strike”) under Federal Rule of Civil Procedure 12(f), made applicable to this proceeding by Rule 7012 of the Federal Rules of Bankruptcy Procedure, in Adversary Proceeding 10-04417 (ECF Nos. 74-75) and Adversary Proceeding 10-04554 (ECF Nos. 76-77) (collectively the “Adversary Proceedings”) seeking an order striking the Defendants’ Lustig Family 1990 Trust (“Lustig Trust”) and David Ivan Lustig, individually and as Trustee of the Lusting Trust (collectively, “Defendants”) Affirmative Defenses Eight (Court should use equitable powers to dismiss the Trustee’s claims), Nine (Court should grant Defendants an equitable credit), Ten (Trustee’s claims are barred by the single satisfaction rule under 11.U.S.C. §550(d)), Eleven (Defendants are entitled to a credit under the theory of recoupment), and Twelve (Defendants are entitled to a set-off under 11 U.S.C. § 553).

On March 31, 2017, Defendants filed their Memorandum of Law in Opposition to Trustee’s Motion to Strike and the Declaration of Bryan Ha to which Exhibits A-BB were attached (Adv. Pro. No. 10-04417 (ECF No. 76 and 78) and Adv. Pro. No. 10-04554 (ECF Nos. 79 and 81) (“Opposition”). The Opposition withdrew Defendants’ Twelfth Affirmative Defense.

On April 14, 2017, the Trustee filed his Reply in Support of the Trustee’s Motion to Strike (“Reply”) (Adv. Pro. No. 10-04417 (ECF. No. 79) and Adv. Pro. No. 10-04554 (ECF. No. 82).

On May 2, 2017, a hearing was held before this Court. At the hearing, because the Defendants submitted a substantial amount of documentary evidence and David Lustig's declaration in opposition to the Motion to Strike, the Court suggested, and the Parties agreed, to treat the Motion to Strike as a motion for partial summary judgment under Rule 56 of the Federal Rules of Civil Procedure ("Motion for Partial Summary Judgment").

The Court issued its Memorandum Decision Granting Partial Summary Judgment Striking Certain Affirmative Defenses on June 1, 2017 ("Decision") holding Defendants' Eighth through Eleventh Affirmative Defenses are stricken and the Twelfth Affirmative Defense is withdrawn (Adv. Pro. No.10-04417 (ECF. No. 82) and Adv. Pro. No.10-04554 (ECF. No. 84).

For the reasons set forth in the Court's Decision, which is incorporated herein and made a part hereof, it is hereby **ORDERED** that:

1. The Trustee's Motion for Partial Summary Judgment is **GRANTED**; and
2. Defendants' Affirmative Defenses Eight, Nine, Ten and Eleven are stricken and dismissed as a matter of law, and the Twelfth Affirmative Defense has been withdrawn.

Dated: June 12, 2017  
New York, New York

/s/ STUART M. BERNSTEIN  
HONORABLE STUART M. BERNSTEIN  
UNITED STATES BANKRUPTCY JUDGE

## EXHIBIT 8

LAW OFFICE OF  
RICHARD E. SIGNORELLI  
799 Broadway, Suite 539  
New York, NY 10003  
Telephone: 212 254 4218  
Facsimile: 212 254 1396  
rsignorelli@nycLITIGATOR.com<sup>SM</sup>  
www.nycLITIGATOR.com<sup>SM</sup>  
*Attorneys for Defendant David Ivan Lustig*

UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X  
SECURITIES INVESTOR PROTECTION  
CORPORATION,

Adv. Pro. No. 08-01789 (SMB)

Plaintiff-Applicant,

SIPA LIQUIDATION

v.

(Substantively Consolidated)

BERNARD L. MADOFF INVESTMENT  
SECURITIES LLC,

Defendant.

-----X  
In re:

BERNARD L. MADOFF,

Debtor.

-----X  
IRVING PICARD, Trustee for the Liquidation  
of Bernard L. Madoff Investment Securities LLC,

Plaintiff,

Adv. Pro. No. 10-4554 (SMB)

v.

DAVID IVAN LUSTIG,

Defendant.

-----X

**NOTICE OF APPEAL AND STATEMENT OF ELECTION<sup>1</sup>**

**Part 1: Identify the appellant(s)**

1. Name(s) of appellant(s):

David Ivan Lustig

2. Position of appellant(s) in the adversary proceeding or bankruptcy case that is the subject of this appeal:

Defendant

**Part 2: Identify the subject of this appeal**

1. Describe the judgment, order, or decree appealed from:

Order Granting Partial Summary Judgment Striking Affirmative Defenses dated June 12, 2017, and entered on June 13, 2017 (Dkt. No. 85) (annexed hereto as Exhibit A)<sup>2</sup>

2. State the date on which the judgment, order, or decree was entered:

June 13, 2017

**Part 3: Identify the other parties to the appeal**

List the names of all parties to the judgment, order, or decree appealed from and the names, addresses and telephone numbers of their attorneys (attach additional pages if necessary):

---

<sup>1</sup>The bankruptcy reference was previously withdrawn with respect to this case for the purpose of adjudicating certain issues in this Court. This action was assigned to the Honorable Jed.S. Rakoff upon the withdrawal of the bankruptcy reference. Picard v. Lustig, Docket No. 12 CV 2783 (JSR). Because this action was previously assigned to Judge Rakoff, this appeal and the accompanying motion for leave to appeal should also be assigned to Judge Rakoff.

<sup>2</sup>A motion for leave to appeal from this order will be filed in connection with this notice of appeal.

- |   |   |
|---|---|
| 1. Party:   | Attorney:   |
| Irving H. Picard, Trustee for the SIPA<br>Liquidation of Bernard L. Madoff<br>Investment Securities LLC | Baker & Hostetler LLP<br>45 Rockefeller Plaza<br>New York, New York 10111<br>Tel: 212-589-4200<br>David J. Sheehan, Esq.<br>Nicholas J. Cremona, Esq.<br>Dean D. Hunt, Esq. |
  
- |                   |  |
|-------------------|--|
| 2. Party:         | Attorney:  |
| David Ivan Lustig | Law Office of Richard E. Signorelli<br>799 Broadway, Suite 539<br>New York, New York 10003<br>Tel: 212-254-4218<br>Richard E. Signorelli, Esq.<br>Bryan Ha, Esq. |

**Part 4: Optional election to have appeal heard by District Court (applicable only in certain districts)**

If a Bankruptcy Appellate Panel is available in this judicial district, the Bankruptcy Appellate Panel will hear this appeal unless, pursuant to 28 U.S.C. § 158(c)(1), a party elects to have the appeal heard by the United States District Court. If an appellant filing this notice wishes to have the appeal heard by the United States District Court, check below. Do not check the box if the appellant wishes the Bankruptcy Appellate Panel to hear the appeal.

Appellant(s) elect to have the appeal heard by the United States District Court rather than by the Bankruptcy Appellate Panel.

(This is not applicable here because there is no Bankruptcy Appellate Panel in this

district.).

Dated: New York, New York  
June 26, 2017

Respectfully submitted,

LAW OFFICE OF  
RICHARD E. SIGNORELLI

By: /s/ Richard E. Signorelli  
/s/ Bryan Ha

---

Richard E. Signorelli  
Bryan Ha  
799 Broadway, Suite 539  
New York, NY 10003  
Telephone: 212 254 4218  
Facsimile: 212 254 1396  
rsignorelli@nycLITIGATOR.com<sup>SM</sup>  
www.nycLITIGATOR.com<sup>SM</sup>

Attorneys for Defendant David Ivan Lustig

FILING AND SERVICE VIA ELECTRONIC FILING

## **EXHIBIT A**

**UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK**

SECURITIES INVESTOR PROTECTION  
CORPORATION,

Plaintiff-Applicant,

v.

BERNARD L. MADOFF INVESTMENT  
SECURITIES, LLC,

Defendant.

Adv. Pro. No. 08-01789 (SMB)

SIPA Liquidation

(Substantively Consolidated)

In re:

BERNARD L. MADOFF INVESTMENT  
SECURITIES LLC,

Debtor.

IRVING H. PICARD, Trustee for the Substantively  
Consolidated SIPA Liquidation of Bernard L.  
Madoff Investment Securities LLC and Bernard L.  
Madoff,

Plaintiff,

v.

THE LUSTIG FAMILY 1990 TRUST; and DAVID  
I. LUSTIG, individually and in his capacity as  
Trustee for The Lustig Family 1990 Trust,

Defendants.

Adv. Pro. No.: 10-04417 (SMB)

IRVING H. PICARD, Trustee for the Substantively  
Consolidated SIPA Liquidation of Bernard L.  
Madoff Investment Securities LLC and Bernard L.  
Madoff,

Plaintiff,

v.

DAVID IVAN LUSTIG,

Adv. Pro. No. 10-04554 (SMB)

Defendant.

**ORDER GRANTING PARTIAL SUMMARY JUDGMENT  
STRIKING AFFIRMATIVE DEFENSES**

On February 28, 2017, Irving H. Picard (“Trustee”), as trustee for the substantively consolidated liquidation of the business of Bernard L. Madoff Investment Securities, LLC under the Securities Investor Protection Act, 15 U.S.C. §§ 78aaa, *et seq.*, and the estate of Bernard L. Madoff filed his Motion to Strike Affirmative Defenses (“Motion to Strike”) under Federal Rule of Civil Procedure 12(f), made applicable to this proceeding by Rule 7012 of the Federal Rules of Bankruptcy Procedure, in Adversary Proceeding 10-04417 (ECF Nos. 74-75) and Adversary Proceeding 10-04554 (ECF Nos. 76-77) (collectively the “Adversary Proceedings”) seeking an order striking the Defendants’ Lustig Family 1990 Trust (“Lustig Trust”) and David Ivan Lustig, individually and as Trustee of the Lusting Trust (collectively, “Defendants”) Affirmative Defenses Eight (Court should use equitable powers to dismiss the Trustee’s claims), Nine (Court should grant Defendants an equitable credit), Ten (Trustee’s claims are barred by the single satisfaction rule under 11.U.S.C. §550(d)), Eleven (Defendants are entitled to a credit under the theory of recoupment), and Twelve (Defendants are entitled to a set-off under 11 U.S.C. § 553).

On March 31, 2017, Defendants filed their Memorandum of Law in Opposition to Trustee’s Motion to Strike and the Declaration of Bryan Ha to which Exhibits A-BB were attached (Adv. Pro. No. 10-04417 (ECF No. 76 and 78) and Adv. Pro. No. 10-04554 (ECF Nos. 79 and 81) (“Opposition”). The Opposition withdrew Defendants’ Twelfth Affirmative Defense.

On April 14, 2017, the Trustee filed his Reply in Support of the Trustee’s Motion to Strike (“Reply”) (Adv. Pro. No. 10-04417 (ECF. No. 79) and Adv. Pro. No. 10-04554 (ECF. No. 82).

On May 2, 2017, a hearing was held before this Court. At the hearing, because the Defendants submitted a substantial amount of documentary evidence and David Lustig's declaration in opposition to the Motion to Strike, the Court suggested, and the Parties agreed, to treat the Motion to Strike as a motion for partial summary judgment under Rule 56 of the Federal Rules of Civil Procedure ("Motion for Partial Summary Judgment").

The Court issued its Memorandum Decision Granting Partial Summary Judgment Striking Certain Affirmative Defenses on June 1, 2017 ("Decision") holding Defendants' Eighth through Eleventh Affirmative Defenses are stricken and the Twelfth Affirmative Defense is withdrawn (Adv. Pro. No.10-04417 (ECF. No. 82) and Adv. Pro. No.10-04554 (ECF. No. 84).

For the reasons set forth in the Court's Decision, which is incorporated herein and made a part hereof, it is hereby **ORDERED** that:

1. The Trustee's Motion for Partial Summary Judgment is **GRANTED**; and
2. Defendants' Affirmative Defenses Eight, Nine, Ten and Eleven are stricken and dismissed as a matter of law, and the Twelfth Affirmative Defense has been withdrawn.

Dated: June 12, 2017  
New York, New York

/s/ STUART M. BERNSTEIN  
HONORABLE STUART M. BERNSTEIN  
UNITED STATES BANKRUPTCY JUDGE

## EXHIBIT 9

LAW OFFICE OF  
RICHARD E. SIGNORELLI  
799 Broadway, Suite 539  
New York, NY 10003  
Telephone: 212 254 4218  
Facsimile: 212 254 1396  
rsignorelli@nycLITIGATOR.com<sup>SM</sup>  
www.nycLITIGATOR.com<sup>SM</sup>  
*Attorneys for Defendants The Lustig Family  
1990 Trust and David I. Lustig, individually  
and in his capacity as Trustee for The Lustig  
Family 1990 Trust*

UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X  
SECURITIES INVESTOR PROTECTION  
CORPORATION,

Adv. Pro. No. 08-01789 (SMB)

Plaintiff-Applicant,

SIPA LIQUIDATION

v.

(Substantively Consolidated)

BERNARD L. MADOFF INVESTMENT  
SECURITIES LLC,

Defendant.

-----X  
In re:

BERNARD L. MADOFF,

Debtor.

-----X  
IRVING PICARD, Trustee for the Liquidation  
of Bernard L. Madoff Investment Securities LLC,

Adv. Pro. No. 10-4417 (SMB)

Plaintiff,

v.

THE LUSTIG FAMILY 1990 TRUST, et al.,

Defendants.  
-----X

**NOTICE OF APPEAL AND STATEMENT OF ELECTION<sup>1</sup>**

**Part 1: Identify the appellant(s)**

1. Name(s) of appellant(s):

The Lustig Family 1990 Trust and David I. Lustig, individually and in his capacity as Trustee for The Lustig Family 1990 Trust

2. Position of appellant(s) in the adversary proceeding or bankruptcy case that is the subject of this appeal:

Defendants

**Part 2: Identify the subject of this appeal**

1. Describe the judgment, order, or decree appealed from:

Order Granting Partial Summary Judgment Striking Affirmative Defenses dated June 12, 2017, and entered on June 13, 2017 (Dkt. No. 83) (annexed hereto as Exhibit A)<sup>2</sup>

2. State the date on which the judgment, order, or decree was entered:

June 13, 2017

**Part 3: Identify the other parties to the appeal**

List the names of all parties to the judgment, order, or decree appealed from and the names, addresses and telephone numbers of their attorneys (attach additional pages if necessary):

---

<sup>1</sup>The bankruptcy reference was previously withdrawn with respect to this case for the purpose of adjudicating certain issues in this Court. This action was assigned to the Honorable Jed.S. Rakoff upon the withdrawal of the bankruptcy reference. Picard v. The Lustig Family 1990 Trust, et al., Docket No. 12 CV 2782 (JSR). Because this action was previously assigned to Judge Rakoff, this appeal and the accompanying motion for leave to appeal should also be assigned to Judge Rakoff.

<sup>2</sup>A motion for leave to appeal from this order will be filed in connection with this notice of appeal.

- |   |   |
|---|---|
| 1. Party:   | Attorney:   |
| Irving H. Picard, Trustee for the SIPA<br>Liquidation of Bernard L. Madoff<br>Investment Securities LLC | Baker & Hostetler LLP<br>45 Rockefeller Plaza<br>New York, New York 10111<br>Tel: 212-589-4200<br>David J. Sheehan, Esq.<br>Nicholas J. Cremona, Esq.<br>Dean D. Hunt, Esq. |
  
- |                              |  |
|------------------------------|--|
| 2. Party:                    | Attorney:  |
| The Lustig Family 1990 Trust | Law Office of Richard E. Signorelli<br>799 Broadway, Suite 539<br>New York, New York 10003<br>Tel: 212-254-4218<br>Richard E. Signorelli, Esq.<br>Bryan Ha, Esq. |
  
- |                 |  |
|-----------------|--|
| 3. Party:       | Attorney:  |
| David I. Lustig | Law Office of Richard E. Signorelli<br>799 Broadway, Suite 539<br>New York, New York 10003<br>Tel: 212-254-4218<br>Richard E. Signorelli, Esq.<br>Bryan Ha, Esq. |

**Part 4: Optional election to have appeal heard by District Court (applicable only in certain districts)**

If a Bankruptcy Appellate Panel is available in this judicial district, the Bankruptcy Appellate Panel will hear this appeal unless, pursuant to 28 U.S.C. § 158(c)(1), a party elects to have the appeal heard by the United States District Court. If an appellant filing this notice wishes to have the appeal heard by the United States District Court, check below. Do not check the box if the appellant wishes the Bankruptcy Appellate Panel to hear the appeal.

Appellant(s) elect to have the appeal heard by the United States District Court rather than by the Bankruptcy Appellate Panel.

(This is not applicable here because there is no Bankruptcy Appellate Panel in this district.).

Dated: New York, New York  
June 26, 2017

LAW OFFICE OF  
RICHARD E. SIGNORELLI

By: /s/ Richard E. Signorelli  
/s/ Bryan Ha

---

Richard E. Signorelli  
Bryan Ha  
799 Broadway, Suite 539  
New York, NY 10003  
Telephone: 212 254 4218  
Facsimile: 212 254 1396  
rsignorelli@nycLITIGATOR.com<sup>SM</sup>  
www.nycLITIGATOR.com<sup>SM</sup>

Attorneys for Defendants The Lustig Family  
1990 Trust and David I. Lustig

FILING AND SERVICE VIA ELECTRONIC FILING

## **EXHIBIT A**

**UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK**

SECURITIES INVESTOR PROTECTION  
CORPORATION,

Plaintiff-Applicant,

v.

BERNARD L. MADOFF INVESTMENT  
SECURITIES, LLC,

Defendant.

Adv. Pro. No. 08-01789 (SMB)

SIPA Liquidation

(Substantively Consolidated)

In re:

BERNARD L. MADOFF INVESTMENT  
SECURITIES LLC,

Debtor.

IRVING H. PICARD, Trustee for the Substantively  
Consolidated SIPA Liquidation of Bernard L.  
Madoff Investment Securities LLC and Bernard L.  
Madoff,

Plaintiff,

v.

THE LUSTIG FAMILY 1990 TRUST; and DAVID  
I. LUSTIG, individually and in his capacity as  
Trustee for The Lustig Family 1990 Trust,

Defendants.

Adv. Pro. No.: 10-04417 (SMB)

IRVING H. PICARD, Trustee for the Substantively  
Consolidated SIPA Liquidation of Bernard L.  
Madoff Investment Securities LLC and Bernard L.  
Madoff,

Plaintiff,

v.

DAVID IVAN LUSTIG,

Adv. Pro. No. 10-04554 (SMB)

Defendant.

**ORDER GRANTING PARTIAL SUMMARY JUDGMENT  
STRIKING AFFIRMATIVE DEFENSES**

On February 28, 2017, Irving H. Picard (“Trustee”), as trustee for the substantively consolidated liquidation of the business of Bernard L. Madoff Investment Securities, LLC under the Securities Investor Protection Act, 15 U.S.C. §§ 78aaa, *et seq.*, and the estate of Bernard L. Madoff filed his Motion to Strike Affirmative Defenses (“Motion to Strike”) under Federal Rule of Civil Procedure 12(f), made applicable to this proceeding by Rule 7012 of the Federal Rules of Bankruptcy Procedure, in Adversary Proceeding 10-04417 (ECF Nos. 74-75) and Adversary Proceeding 10-04554 (ECF Nos. 76-77) (collectively the “Adversary Proceedings”) seeking an order striking the Defendants’ Lustig Family 1990 Trust (“Lustig Trust”) and David Ivan Lustig, individually and as Trustee of the Lusting Trust (collectively, “Defendants”) Affirmative Defenses Eight (Court should use equitable powers to dismiss the Trustee’s claims), Nine (Court should grant Defendants an equitable credit), Ten (Trustee’s claims are barred by the single satisfaction rule under 11.U.S.C. §550(d)), Eleven (Defendants are entitled to a credit under the theory of recoupment), and Twelve (Defendants are entitled to a set-off under 11 U.S.C. § 553).

On March 31, 2017, Defendants filed their Memorandum of Law in Opposition to Trustee’s Motion to Strike and the Declaration of Bryan Ha to which Exhibits A-BB were attached (Adv. Pro. No. 10-04417 (ECF No. 76 and 78) and Adv. Pro. No. 10-04554 (ECF Nos. 79 and 81) (“Opposition”). The Opposition withdrew Defendants’ Twelfth Affirmative Defense.

On April 14, 2017, the Trustee filed his Reply in Support of the Trustee’s Motion to Strike (“Reply”) (Adv. Pro. No. 10-04417 (ECF. No. 79) and Adv. Pro. No. 10-04554 (ECF. No. 82).

On May 2, 2017, a hearing was held before this Court. At the hearing, because the Defendants submitted a substantial amount of documentary evidence and David Lustig's declaration in opposition to the Motion to Strike, the Court suggested, and the Parties agreed, to treat the Motion to Strike as a motion for partial summary judgment under Rule 56 of the Federal Rules of Civil Procedure ("Motion for Partial Summary Judgment").

The Court issued its Memorandum Decision Granting Partial Summary Judgment Striking Certain Affirmative Defenses on June 1, 2017 ("Decision") holding Defendants' Eighth through Eleventh Affirmative Defenses are stricken and the Twelfth Affirmative Defense is withdrawn (Adv. Pro. No.10-04417 (ECF. No. 82) and Adv. Pro. No.10-04554 (ECF. No. 84).

For the reasons set forth in the Court's Decision, which is incorporated herein and made a part hereof, it is hereby **ORDERED** that:

1. The Trustee's Motion for Partial Summary Judgment is **GRANTED**; and
2. Defendants' Affirmative Defenses Eight, Nine, Ten and Eleven are stricken and dismissed as a matter of law, and the Twelfth Affirmative Defense has been withdrawn.

Dated: June 12, 2017  
New York, New York

/s/ STUART M. BERNSTEIN  
HONORABLE STUART M. BERNSTEIN  
UNITED STATES BANKRUPTCY JUDGE